(9)

No. 00-391-CSY Title: Florida, Petitioner
v.
Robert A. Thomas

Docketed: September 13, 2000 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Sep 5 2000	Petition for writ of certiorari filed. (Response due October 13, 2000)
	Oct 4 2000	Waiver of right of respondent Robert A. Thomas to respond filed.
	Oct 11 2000	DISTRIBUTED for Conference of October 27, 2000
	Oct 20 2000	Response requested.
	Nov 16 2000	Brief of respondent Robert A. Thomas in opposition filed.
	Nov 16 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Nov 29 2000	REDISTRIBUTED for Conference of January 5, 2001
	Jan 8 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jan 8 2001	Petition GRANTED. SET FOR ARGUMENT April 25, 2001. **********
	Feb 20 2001	Joint appendix filed.
	Feb 20 2001	Brief of petitioner Florida filed.
	Feb 22 2001	Brief amicus curiae of United States filed.
	Mar 5 2001	Record filed.
	Mar 9 2001	CIRCULATED.
	Mar 14 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 23 2001	Brief of respondent Robert A. Thomas filed.
	Mar 26 2001	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Mar 30 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Apr 2 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 13 2001	Reply brief of petitioner Florida filed.
	Apr 25 2001	ARGUED.

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Case No. _____

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. THOMAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE ABILITY TO CONDUCT A SEARCH INCIDENT TO AN ARREST OF A RECENT OCCUPANT OF A MOTOR VEHICLE IS CONDITIONED UPON A LAW ENFORCEMENT OFFICER "INITIATING CONTACT" WITH THE DEFENDANT CONFLICTS WITH NEW YORK v. BELTON AND DECISIONS OF A MAJORITY OF FEDERAL AND STATE APPELLATE COURTS.

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CASE NO. _____

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. THOMAS,

Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Thomas v. State, __ So.2d __ (Fla. 1999), 1999 WL 1894291 (Fla).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, Case No. SC93070, (A 1-12), as well as the court's order denying rehearing. (A 13-14). The appendix further contains the opinion of the Florida Second District Court of Appeal, State v. Thomas, 711 So.2d 1241 (Fla. 2nd DCA 1998). (A 15-19). The parties will be referred to as they appear before this Court or as they stood in the court(s) below.[1]

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[1] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below was entered on October 14, 1999. Petitioner's Motion for Rehearing was denied June 8, 2000, in light of a revised opinion entered that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. - This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme

Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out by the Florida Supreme Court in the body of its decision are as follows:

> On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle.

The Florida Supreme Court next recited a brief summary of the prior proceedings in this case:

Following a hearing, the trial court granted Thomas's motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). The district court reversed, relying on New York v. Belton, 433 U.S. 454 (1981), and held that because the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, the search was lawful because it was incident to the valid arrest of Thomas. See Thomas, 711 So. 2d at 1243. (A 1-2, footnotes deleted)

The Florida Supreme Court held that on these facts the District Court's opinion was in error and adopted a position which places a limitation on the bright-line rule set forth by this Court in New York v. Belton, 433 U.S. 454 (1981), to wit: Belton "is limited to situations where the law enforcement officer initiates contact with the defendant...." (A 10) The Florida Supreme Court determined that because the defendant in this case did not exit his vehicle upon the direction of the law enforcement officer Belton did not apply. (A 10)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN NEW YORK v. BELTON AND WITH A MAJORITY OF FEDERAL AND STATE APPELLATE COURTS, BY LIMITING A SEARCH INCIDENT TO A VALID ARREST TO SCENARIOS WHERE THE LAW ENFORCEMENT OFFICER INITIATES CONTACT WITH THE ARRESTEE. THEREFORE, THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THIS CONFLICT.

In New York v. Belton, 453 U.S. 454 (1981), the Court determined that "... when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Belton, 453 U.S. at 460. Thus, there should be no debate as to what is the triggering mechanism of a valid search of a vehicle incident to an arrest -- **it is the arrest itself**. See, United States v. Robinson, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search").

The Court accordingly established a bright-line rule that is to be applied in a simple and straightforward fashion. The Florida Supreme Court *sub judice* misapprehends the nature and scope of the bright-line rule announced in Belton. The Florida Supreme Court determined that the Belton bright-line rule does not extend to a situation where the first contact the defendant has with the officer occurs after the defendant has exited the vehicle of his own accord: "Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile. " (A 10) The opinion below unjustifiably adopts a rationale which is contrary to the reasoning of Belton, which blurs, if not erodes, the bright-line rule established by Belton.

Relying on United States v. Hudgins, 52 F. 3d 115, 119 (6th Circuit 1995), as persuasive, the court quoted Hudgins:

> ...However where a defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall within Belton's bright-line rule, and a case by case analysis of the reasonableness of the search under Chimel becomes necessary.

(A 9). The holdings of the Florida Supreme Court and the Sixth Circuit have resulted in an unreasonable limitation of Belton.

Examples of better decisions adopting the Belton bright-line test and reflecting a more reasonable and sound approach are United States v. Snook, 88 F.3d (8th Cir. 1996); United States v. Franco, 981 F.2d 470 (10th Cir. 1992); and United States v. Arango, 879 F.2d 1501 (7th Cir. 1989).

In United States v. Snook, 88 F. 3d 605 (8th Cir. 1996), the court affirmed the search of the defendant's automobile under Belton. The court upheld the search incident to arrest. "The fact that Snook had just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an "occupant" of the vehicle." Snook, 88 F. 3d at 608. As in the present case, the defense argued that Belton did not apply since the defendant had just stepped out of the car and was not an occupant at the time of his arrest. The Eighth Circuit explicitly rejected this argument and determined that although Snook stepped out of the vehicle of his own accord, he was an occupant for purposes of Belton.

Similarly, in United States v. Franco, 981 F. 2d 470 (10th Cir. 1992), the court upheld the search incident to arrest. Such a search is permissible notwithstanding the fact that the arrestee is out of the automobile and under the control of the officer. (citations omitted). Mr. Franco was a recent occupant of his vehicle and the arrest was made in close proximity to his vehicle." Franco, 981 F. 2d at 473. In reviewing the policies considerations behind Belton, the Court further determined "the law does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle." Franco, 981 F. 2d at 473.

In United States v. Arango, 879 F. 2d 1501 (7th Cir. 1989), the defense argued the search incident to arrest was not valid since he was approximately a block from the scene of the crime at the time of his arrest. The court rejected this argument and found the search was consistent with Belton in order to protect persons and evidence. The court relied on United States v. Cotton, 751 F.2d 1146, 1148 (10th Cir.1985), quoted in United States v. Karlin, 852 F.2d 968, 970 (7th Cir.1988), and held the law:

> does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle.

To require a police officer to make instantaneous legal determinations undermines the policy behind Belton and does not further "the Court's preference for a straightforward rule for guidance of police officers and avoidance of hindsight determinations in litigation." Karlin, 852 F.2d at 971.

The split in the federal circuits is apparent when looking at the above decisions in contrast to the holding in Hudgins, supra, United States v. Strahan,984 F. 2d 155 (6th Cir. 1993) and other cases, for example. In Strahan, the court determined that Strahan was approximately thirty feet from his vehicle when arrested. The court determined Strahan was not an occupant of the vehicle and Chimel, not Belton, governed. Similarly in United States v. Fafowora, 865 F. 2d 360 (D.C. Cir. 1989), the court held the search incident to arrest was improper since the defendants were walking away from their Jeep and the contact occurred well outside of the car. The

court reasoned that where the police come upon an arrestee outside of an automobile, no bright line rule is required. Instead the Chimel analysis applies.[2]

This case by case analysis in which one must determine the intent of the arrestee upon his exiting of the vehicle is a practical impossibility that leads to inconsistent police enforcement and inconsistent legal analysis by inferior courts. The Court, in Belton, acknowledged same and discussed the need for a bright line rule, citing Dunaway v. New York, 442 U.S. 200 (1979): "In short, [a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. (cite omitted)."

Moreover, a cursory review of state appellate court decisions also reveals a split of authority. Some jurisdictions have held, in conformity with the Florida decision at bar, that an arrestee is a "recent occupant" of a vehicle only where the law enforcement officer initiates contact with the defendant while the defendant is inside the automobile. See, e.g., People v. Fernengel, 216 Mich.App. 420, 549 N.W.2d 361 (1996); Commonwealth v. Santiago, 410 Mass. 737, 575 N.E.2d 350 (1991). Contrarily, other jurisdictions have determined that a "recent occupant" of a vehicle is such whether a law enforcement officer initiates the contact with the arrestee. See, e.g., Glasco v. Commonwealth, 257 Va. 433, 513 S.E.2d 137 (1999); People v. Bosnak, 262 Ill.App.3d 122, 199 Ill.Dec. 331, 633 N.E.2d 1322 (1994). It is submitted that this latter view is consistent with the reasoning of Belton clearly is more

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[2] Interestingly, the opinion of United States v. Tobon-Sierra, 954 F. Supp. 73 (S.D. N.Y. 1997), demonstrates the internal conflict in the federal system. The court acknowledged that several circuits have approved the search of a vehicle under Belton when a defendant was a recent occupant, and was arrested near the car. These circuits did not require any finding that the defendant was motivated to leave the vehicle due to the approach of law enforcement. The court distinguished the cases cited by the defense in Tobon-Sierra which relied upon a contact being initiated by police. The court declined to reach that issue since the defendant exited the vehicle in response to police contact.

sound, and conflicts with the minority view exemplified by the case *sub judice*.

The Belton bright-line rule exists so that a police officer can appreciate the factors he deals with and consistently apply the rules to circumstances he encounters. "The protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." Belton, 101 S. Ct. at 2863. To now hold that a police officer's ability to effect a lawful search of the vehicle of an arrested recent occupant of that vehicle is dependent upon whether it happens to be the citizen/defendant or the police officer who makes first contact is illogical and certainly not contemplated by Belton.

Because arrest alone triggers a Belton search, reliance by the Florida Supreme Court on Knowles v. Iowa, __ U.S. __, 119 S.Ct. 484 (1998), is misplaced. There was no arrest in the Knowles case, merely the issuance of a traffic citation.[3] This Court determined that the two rationales relied upon to support a search incident to an arrest, officer safety and the need to preserve evidence, are either not present to the same extent or are not present at all in citation issuance situations as opposed to custodial arrest situations. But these rationales **are present**

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[3] Moreover, Knowles was a very limited factual scenario restricted to a particular Iowa statute, which allows the "issuance of a citation in lieu of an arrest 'does not affect the officer's authority to conduct an otherwise lawful search.' The Iowa Supreme Court has interpreted this provision as providing authority to officers to conduct a full-blown search of an automobile and driver in those cases where police elect not to make a custodial arrest and instead issue a citation--that is, a search incident to a citation." (Cites omitted). The Court did not conclude that Knowles fell outside the Belton umbrella, rather this Court held that in this "routine traffic stop" the minimal additional intrusion of ordering a driver out of his car for officer safety might be justified, but that the "considerably greater intrusion attending a full field- type search" was not. Clearly the Court in Knowles faced a completely different circumstance than presented to the court herein.

in every custodial arrest situation. That is why the facts surrounding a custodial arrest (such as who initiated contact with whom) are "irrelevant" in applying the Belton bright-line rule. If a valid custodial arrest of a recent occupant of a motor vehicle has been effected, a search of that vehicle incident to that arrest may be undertaken. Stated otherwise, the issuance of a citation (as in Knowles) is not the functional equivalent of a custodial arrest (as in Belton and as in the instant case), and as between the two, **only the arrest can trigger a search of a recently occupied vehicle.** Knowles does not and can not control the instant case -- Belton clearly does.[4]

In effect, the Florida Supreme Court has corrupted any bright line rule in Belton and has made "any" application dependent upon the particular facts of each particular case.[5]

In the instant case, Thomas was **lawfully arrested** based upon an outstanding warrant for a probation violation. It is of no moment what transpired factually prior to the valid arrest -- **the lawful arrest in and of itself triggers application of the Belton rule**, and the ensuing search of the vehicle incident to that lawful arrest was constitutionally permissible and reasonable. There is no need to inquire further as to whether there was additional support for the authority of the search, such as whether there was a danger to the officer or whether there was a need to preserve evidence. In United States v. Robinson, supra, this Court rejected the need for a case-by-case examination of the reasons supporting the authority for a search -- the lawful arrest itself is all the support needed. Robinson, 414 U.S. at 235.

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[4] The Florida Supreme Court, in applying Knowles to Belton, observed: ". . . [H]ence, it can be inferred that the bright line rule does not apply, as clarified by Knowles, when its application has been extended to a situation not contemplated by the Supreme Court in Belton. Rather, the Chimel factors of threat to officer safety or the necessity of preservation of evidence must be present to validate the search." (A-7).

[5] Article I, Section 12 of the Florida Constitution specifies that the right of the people to be free from unreasonable searches and seizures is to be construed in conformity with the Fourth Amendment of the United States Constitution as interpreted by the Supreme Court of the United States.

Creation of the "who initiated contact" distinction has resulted in the establishment of conflict amongst several federal circuits and state appellate courts. To prevent this conflict from further hindering the policeman in the street as he attempts to do his duty, this Court should grant certiorari, decide the issue adverse to the Florida Supreme Court's holding and reverse the decision of the Florida Supreme Court.

CONCLUSION

The decision of the Florida Supreme Court below is in conflict with well established Fourth Amendment law as set down in decisions of this Court as well as decisions of other federal and state appellate courts. Because of this conflict, Respondent respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court of Florida

No. 93,070

ROBERT A. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[October 14, 1999]

REVISED OPINION

HARDING, C.J.

We have for review State v. Thomas, 711 So. 2d 1241 (Fla. 2d DCA 1998), which expressly and directly conflicts with the opinion in State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. For the reasons expressed below, we quash the decision of the Second District Court of Appeal in Thomas.

The facts of Thomas are as follows. On the evening in question, Robert Thomas entered the driveway of a residential

home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle.

Following a hearing, the trial court granted Thomas's motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). The district court reversed, relying on New York v. Belton, 433 U.S. 454 (1981), and held that because the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, the search was lawful because it was incident to the valid arrest of Thomas. See Thomas, 711 So. 2d at 1243.

In Howard, the defendant was followed by a police officer who had knowledge of an outstanding warrant for his arrest for a probation violation. Howard drove into the parking lot of a convenience store, and upon exiting his car with a pouch in his hand, he spotted the officer and placed the pouch back into his car and locked the door. After Howard was

arrested on the warrant, he then instructed his brother who was present at the scene not to allow the police to search his car. However, the officer took the keys from Howard's pocket and searched the vehicle and found contraband.

The trial court suppressed the evidence and the district court affirmed. The district court held that the officer did not have probable cause for a warrantless search of the car. The district court stressed that Howard had already exited his car and locked it. The district court stated that even though the officer's suspicions may have justifiably been aroused, there was no legitimate need or reason to search Howard's car as incident to his valid arrest. See Howard, 538 So. 2d at 1280.

The district court in Thomas distinguished Howard based on the fact that the officer in Howard was in reality conducting a preplanned warrantless search, whereas in Thomas the officer did not know Thomas, nor was he aware of the fact that there was an outstanding warrant for his arrest. In reaching its decision, the district court in Thomas relied on Belton's bright-line rule regarding searches incident to arrests: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460 (1981) (footnote omitted). While we do not question the practicality of this bright-line test, nor its application to arrests that are initiated by the conduct of an officer, we believe there must be a distinction drawn when an individual voluntarily exits his car without provocation from law enforcement personnel and without knowledge of their presence.

In Belton, a New York State policeman was passed by another automobile driving at an excessive rate of speed. The

officer gave chase, overtook the speeding vehicle, and ordered its driver to pull over to the side of the road and stop. After comparing the vehicle registration to the driver's licenses of the driver and the three passengers, one of whom was Belton, the officer discovered that none of the men owned the car, nor were they related to the owner. In the course of verifying their identification, the officer smelled marijuana emanating from the vehicle, and also saw an envelope marked "Supergold" on the floor of the car, which he associated with marijuana. The officer then directed the men to get out of the car and placed them under arrest for unlawful possession of marijuana. He opened the envelope, which contained marijuana, searched the passenger compartment, and found cocaine in a pocket of a leather jacket found in the car.

The United States Supreme Court in Belton referred to Chimel v. California, 395 U.S. 752 (1969), for the proposition that a lawful custodial arrest justifies a contemporaneous search of an individual without a search warrant. The Court in Chimel concluded that such searches were necessary to (1) remove any weapons that the arrestee might have and (2) prevent the concealment or destruction of evidence. Relying on this reasoning, the Court in Belton held that when an officer has made a lawful arrest of the occupant of a vehicle, he may search the passenger compartment of that vehicle as long as it is in within the narrow time frame incident to the arrest. The Court did not state that the Chimel factors must be established before the vehicle can be searched; rather, the Court set up a bright-line rule to be applied in all cases. Florida's district courts have consistently applied this bright-line principle to analogous situations. See Shaw v. State, 449 So. 2d 976 (Fla. 1st DCA 1984) (affirming denial of motion to suppress, even though defendant was handcuffed and placed in the officer's vehicle before the search was conducted); Chapas v. State, 404 So. 2d 1102 (Fla. 2d DCA 1981) (upholding Belton search after

defendant was ordered out of the car, arrested for driving while intoxicated, and placed in a police vehicle); State v. Valdes, 423 So. 2d 944 (Fla. 3d DCA 1982) (holding the search of vehicle justified as a contemporaneous incident of the lawful arrest of defendant, notwithstanding that defendant was removed from the vehicle and placed in a nearby police cruiser); State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991) (upholding Belton search where defendant was pursued by an officer with siren on and lights flashing, arrested for driving under the influence, and placed in a patrol car, and two to three minutes later the officer searched the vehicle); see also United States v. White, 871 F.2d 41 (6th Cir. 1989) (holding that Belton governs when an arrestee is removed from the car prior to the time of search); United States v. Karlin, 852 F.2d 968, 971-72 (7th Cir. 1988); United States v. Cotton, 751 F.2d 1146, 1149 (10th Cir. 1985); United States v. McCrady, 774 F.2d 868, 871-72 (8th Cir. 1985).

However, when searches occur beyond the scope of Belton's bright-line intent, the factors in Chimel of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful. The Supreme Court addressed the parameters of Belton's application in Knowles v. Iowa, 525 U. S. 113 (1998). In Knowles, the defendant was only issued a traffic citation, and was not placed under arrest. Chief Justice Rehnquist, writing for the Court, held that a full search of an automobile pursuant to issuance of a citation for speeding violated the Fourth Amendment. The Court declared:

> Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for the destruction or loss of evidence is not present at all. We decline to do so.

Id. at 118-19. Not finding the circumstances to be analogous to the circumstances that were the foundation to the Belton decision, the Court declined to apply the bright-line test. Id.

In examining the application and limitations of Belton, we believe the Second District Court of Appeal in Chapas was correct in interpreting Belton as "establishing a rule applicable to all cases involving the arrest of a recent occupant of an automobile." See Chapas, 404 So. 2d at 1104. However, the court in Chapas also stated that "[i]n this case, as in the Belton case, appellant was the occupant of an automobile who had been removed from the vehicle and placed under arrest." Id. at 1104-05. The district court compared the facts of its case to Belton, found the circumstances to be analogous, and therefore applied the bright-line rule. Hence, it can be inferred that the bright-line rule does not apply, as clarified by Knowles, when its application has been extended to a situation not contemplated by the Supreme Court in Belton. Rather, the Chimel factors of threat to officer safety or the necessity of preservation of evidence must be present to validate the search.

In State v. Vanderhorst, 419 So. 2d 762 (Fla. 1st DCA 1982), the defendant was arrested for being intoxicated, and a subsequent search of his car revealed four quaaludes. The confrontation with the officer and the subsequent arrest and search were two-and-one-half hours after defendant's vehicle got stuck in the mud. The district court stated:

> Because Belton incorporated within its opinion that language from Chimel limiting the scope of an officer's search which is reasonably incident to a lawful arrest, it follows that unless the arrestee was himself a recent occupant of the vehicle, the Belton rule has no applicability.

Id. at 764. The district court stressed that Chimel's justification was to deter an attempt made by the arrestee to remove any weapons that might aid in an escape, as well as to prevent the concealment or destruction of evidentiary items. Because the district court did not find the facts to be analogous to Belton, in that the timeliness was lacking, the court then shifted its focus to the concerns of officer safety and evidence preservation, which the court held could not be present at a time so far removed, and accordingly ruled the search was invalid. Again, when the foundation of Belton is extended beyond its original parameters, the bright-line rule is not automatically invoked.

The issue for us to decide in the present case is whether Belton extends to a situation where the first contact the defendant has with the officer occurs after exiting the vehicle. We find the recent analysis of the Sixth Circuit Court of Appeals in United States v. Hudgins, 52 F.3d 115, 119 (6th Cir. 1995), persuasive:

> The search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer.
>
> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartments falls within the scope of Belton and will be upheld as

> reasonable. See United States v. Strahan, 984 F.2d 155, 156 (6th Cir. 1993). . . . Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile. See United States v. Thomas, 11 F.3d 620, 628 (6th Cir. 1993); United States v. Patterson, 993 F.2d 121, 122-23 (6th Cir. 1993) (per curiam); [United States v.] White, 871 F. 2d [41], 44 [(6th Cir. 1989)]; United States v. Hatfield, 815 F.2d 1068, 1071-72 (6th Cir. 1987). However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary. See Strahan, 984 F.2d at 159 (stating that Belton was inapplicable and concluding that the search was unreasonable under Chimel).

(Emphasis added; citations omitted.)

We must caution, however, that in adopting this rationale, this Court is mindful that the arrest and subsequent search should not be invalidated merely because the defendant is outside of the automobile. The occupants of a vehicle cannot avoid the consequences of Belton merely by stepping outside of

the vehicle as the officers approach. See United States v. Mans, 999 F.2d 966, 968-69 (6th Cir. 1993) (upholding Belton search where officer's first verbal contact with defendant was when defendant was outside the car on ground that officer had initiated contact with defendant earlier when defendant knew he was being followed by officer); State v. McLendon, 490 So. 2d 1308, 1309 (Fla. 1st DCA 1986) (highlighting the fact that "[t]o distinguish between arrests of persons in the car from arrests of persons recently vacating the car serves to severely diminish the purpose of the Belton decision").

In conclusion, we hold that Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile. Applying the aforementioned analysis to the present situation, the record is clear that the defendant did not exit the vehicle upon the direction of the law enforcement officer. Because Belton does not apply, the trial court must determine whether the factors in Chimel justify the search of Thomas's vehicle. See Hudgins, 52 F. 3d at 199 (concluding that where Belton is inapplicable, then "a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary"). Based on the record in front of us, we are unable to ascertain whether Officer Maney's safety was endangered or whether the preservation of the evidence was in jeopardy. Under our interpretation, these findings are critical to a determination of the outcome, and therefore we quash the decision under review and remand for further proceedings consistent with this opinion.

It is so ordered.

SHAW, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion.

QUINCE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., concurring in part and dissenting in part.

I concur in the result in this case because I believe that the United States Supreme Court decision in Knowles v. Iowa, 525 U.S. 113 (1998), is a Supreme Court application of the Fourth Amendment to the United States Constitution that is sufficiently analogous to control the specific facts here. In this case there was no reasonable basis related to the vehicle to search Thomas; nor was there an arrest made related to the vehicle.

However, I dissent from the dicta which places serious limitations on New York v. Belton, 453 U.S. 454 (1981), that are not within the United States Supreme Court's decision. Pursuant to article I, section 12, we are bound by interpretations in respect to the Fourth Amendment by the United States Supreme Court. In Belton, the court held only that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460. Belton does not add as a condition "where the law enforcement officer initiates contact with the defendant either by actually confronting the defendant or signaling confrontation with the defendant." The reason for this bright-line rule is officer safety, which is equally as much

a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

Second District - Case No. 97-03576

(Polk County)

James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Petitioner

Robert A. Butterworth, Attorney General, Robert J. Krauss, Senior Assistant Attorney General, and John W. Klawikofsky, Assistant Attorney General, Tampa, Florida,

for Respondent

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 8, 2000

ROBERT A. THOMAS,	*	
	*	
Petitioner,	*	CASE NO. SC93070
	*	
v.	*	
	*	
STATE OF FLORIDA,	*	
	*	
Respondent.	*	
	*	
* * * * * * * * * * * * * * * * *		

In light of the revised opinion, the Petitioner's Motion for Rehearing is denied.

HARDING, C.J., and SHAW, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

QUINCE, J., recused.

The Respondent's Motion for Rehearing denied.

HARDING, C.J., and SHAW, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

WELLS, J., dissents

QUINCE, J. recused.

A True Copy JB

TEST:

Thomas D. Hall
Clerk, Supreme Court

cc: Hon. James Brikhold, Clerk
Hon. Richard M. Weiss, Clerk
Hon. Robert E. Pyle, Judge
Cynthia J. Dodge
Robert J. Krauss
John M. Klawikofsky

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 97-03576
	)	
ROBERT A. THOMAS,	)	
	)	
Appellee.	)	
	)	

Opinion filed May 15, 1998.

Appeal from the Circuit Court
for Polk County;
Robert E. Pyle, Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and Patricia E.
Davenport, Assistant Attorney General,
Tampa, for Appellant.

James Marion Mooreman, Public Defender,
Bartow, and Cynthia J. Dodge,
Assistant Public Defender, Bartow,
for Appellee.

PARKER, Chief Judge.

The State appeals the final order granting Robert A. Thomas's motion to suppress methamphetamine and drug paraphernalia obtained as a result of a search of Thomas's car incident to an arrest on an outstanding warrant. We reverse based upon New York v. Belton, 453 U.S. 454 (1981).

The following evidence was adduced at the hearing on the motion to suppress. Detective Maney was sent to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. Maney knocked on the door, talked to the owners of the residence, and obtained consent to search the residence. Upon arrival, Maney had no intent to make an arrest. After Maney located marijuana inside the residence, the narcotics detectives arrived.

While the detectives were still in the residence, Maney sat outside the residence in his patrol car. Maney observed Thomas drive up to the house, park his car in the driveway, and get out. As Thomas walked toward the rear of the car, Maney got out of his vehicle and met Thomas at the rear of Thomas's car. Maney asked Thomas his name and whether he had a driver's license. Maney made the request because Thomas was in the driveway of a residence where arrests were being made for narcotic offenses. At that time, Maney had no idea that there were narcotics in Thomas's car.

A check of Thomas's driver's license reflected an outstanding warrant. Maney arrested Thomas and took him inside the Crall residence. Maney then went back outside and searched the car incident to Thomas's arrest. As soon as Maney opened the driver's door of the car, he found a baggie with some type of white residue. Maney also found three small bags of a white substance in the glove box. All of the baggies

tested positive for methamphetamine. Five minutes elapsed between the time that Thomas exited his car until Maney searched the car.

Following a hearing, the trial court granted the motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). The trial court concluded that where an individual has exited a vehicle and subsequently is arrested on an outstanding warrant, a search of the vehicle is unlawful. We conclude that this finding was error.

The law is well settled that when a law enforcement officer has made a lawful custodial arrest of the occupant of an automobile that an officer may, incident to the arrest, search the passenger compartment of that vehicle. See Belton, 453 U.S. at 460. This court consistently has applied the rule contained in Belton recognizing that a court may not determine on a case-by-case basis whether the interior of an automobile is within the scope of a search incident to an arrest. See Chapas v. State, 404 So. 2d 1102 (Fla. 2d DCA 1981); see also State v. Smith, 662 So. 2d 725 (Fla. 2d DCA 1995).

There does not have to be a nexus between the arrest of the occupant of a vehicle and the subsequent search of that vehicle. Moreover, a defendant does not have to be in the vehicle at the time of the arrest and subsequent search in order for the search to be valid under Belton. See State v. McLendon, 490 So. 2d 1308, 1309 (Fla. 1st DCA 1986) (court will not "distinguish between arrests of persons in the car from arrests of persons recently vacating the car . . . ."). As noted by the court in State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997), the occupant of a vehicle cannot avoid the consequence of the Belton rule merely by stepping outside the automobile as officers approach. The circumstances in this case clearly fall within the Belton rule.

In this case, the trial court relied on Howard, 538 So. 2d 1279. In Howard, the police officer knew that there was an outstanding warrant for the defendant and followed the defendant's vehicle. The defendant stopped at a convenience store and exited his vehicle. At that time, he saw the officer and immediately placed the pouch that he was carrying back into his vehicle and locked the vehicle. The police officer approached the defendant and placed him under arrest. The officer refused to let the defendant's brother, who had just arrived, take the defendant's car keys. A search of the defendant's vehicle revealed contraband. The Fifth District Court, citing State v. Bennett, 516 So. 2d 964 (Fla. 5th DCA 1987), concluded that the search of the defendant's vehicle was not a search incident to a valid arrest. See Howard, 538 So. 2d at 1280.

The trial court's reliance on Howard is misplaced. In a more recent Fifth District Court decision, State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991), the Fifth District upheld the search of a vehicle incident to an arrest. The defendant was observed driving in an erratic manner. After the defendant stopped and exited the vehicle, he appeared to have difficulty maintaining his balance and exuded the strong smell of alcohol. The defendant was arrested for driving under the influence. When the officer placed him in the patrol car, the defendant's girlfriend accosted the officer. Two or three minutes elapsed before the officer finally was able to search the vehicle at which time he found cannabis. See id. at 1209.

The defendant argued that because he was arrested after he was outside the vehicle, the search was not incident to the arrest. The Fifth District Court disagreed, applying Belton. See id. Furthermore, the court noted that the defendant's reliance on Bennett was misplaced because the court had held in Bennett that an arrest which was a pretext to carrying out a

preplanned, warrantless search of a vehicle could not validate the subsequent search. See id.

We can think of few incidents where a driver will not be out of the vehicle when an arrest is made. Therefore, as long as the arrest is not under a preplanned pretext to conduct a warrantless search of the driver, we conclude that the bright line test in Belton applies. Thomas's arrest was not a pretext to carry out a preplanned warrantless search of his vehicle. The officer did not follow Thomas to the Crall residence because the officer knew of an outstanding warrant for his arrest, nor was Thomas under surveillance which provided the officer with an opportune time to effect his arrest.

Accordingly, the trial court erred in suppressing the evidence obtained during a lawful search incident to an arrest. The order is reversed.

CAMPBELL and QUINCE, JJ., Concur.

Supreme Court, U.S.
FILED
NOV 16 2000
CLERK

(2)

Case No. 00-391

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT A. THOMAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES MARION MOORMAN
PUBLIC DEFENDER
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25 pp

QUESTION PRESENTED

WHETHER THE SEARCH OF RESPONDENT'S VEHICLE WAS CONSTITUTIONAL WHERE THE OFFICER DID NOT CONFRONT OR SIGNAL CONFRONTATION WITH RESPONDENT UNTIL AFTER THE RESPONDENT VOLUNTARILY EXITED THE VEHICLE AND THE OFFICER ARRESTED RESPONDENT WHILE HE WAS STANDING AT THE REAR OF THE VEHICLE WHERE HE COULD NOT REACH INTO IT TO OBTAIN A WEAPON OR DESTROY CONTRABAND.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

STATE OF FLORIDA, Petitioner,

v.

ROBERT A. THOMAS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The Respondent, Robert A. Thomas, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Florida Supreme Court in this case.

OPINION BELOW

The opinion of the Florida Supreme Court, the highest state court of Florida which reviewed the merits of this case is reported as Thomas v. State, 761 So. 2d 1010 (Fla. 1999). A copy of the opinion is contained in Respondent's Appendix.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257(a), because the federal constitutional issue has not been resolved in the state court. In this case, the trial court granted the Respondent's motion to suppress physical evidence found in the automobile he was driving. The intermediate appellate court, the Second District Court of Appeal, reversed on the authority of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The Florida Supreme Court reversed, holding that the search of Respondent's vehicle could not be upheld as incident to his arrest outside the vehicle pursuant to Belton because the law enforcement officer did not initiate contact with the Respondent before he exited the vehicle.

The opinion of the Florida Supreme Court is not final because the court remanded the case to the trial court for further factual and legal decisions relating to the Respondent's federal claim. The Florida Supreme Court ordered the trial court to determine whether the factors in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), justified the search of the Respondent's vehicle. The court specifically directed the lower court to determine whether the officer's safety was endangered or whether the preservation of evidence was in jeopardy. Thomas at 1014. There has not yet been a final order suppressing the evidence issued from the highest court in the State of Florida. Therefore, the federal claim based on the Fourth and Fourteenth Amendments to

the United States Constitution has not been resolved in the state court system. For that reason, the decision is not a final decision as required by 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Respondent accepts the portion of the statement of the facts in Petitioner's brief which quotes the material facts contained in the opinion below, Thomas v. State, 761 So. 2d 1010 (Fla. 1991). Respondent also agrees with Petitioner's characterization of the procedural facts in the trial court and the Second District Court of Appeal on direct appeal. However, Respondent disagrees with Petitioner's characterization of the holding of the Florida Supreme Court below.

The Florida Supreme Court held "that Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signalling confrontation with the defendant regardless of whether the defendant has been removed from or has exited the vehicle." Thomas at 1014. The court then found that since the Respondent did not exit the vehicle upon the direction of the law enforcement officer, Belton did not apply. The court then remanded the case to the trial court to determine whether the factors in Chimel v. California, 395 U. S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), justified the search of the Respondent's vehicle. The court specifically directed the trial court to determine whether the officer's safety was endangered or whether the preservation of evidence was in jeopardy. Thomas.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition for Writ of Certiorari should be denied because the decision of the Florida Supreme Court in this case is not determinative of the federal Fourth and Fourteenth Amendment claim that the evidence was obtained pursuant to an unreasonable warrantless search of Respondent's vehicle.

Congress has limited the power of the United States Supreme Court to review state court decisions to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Jefferson v. City of Tarrant, Alabama, 522 U. S. 75, 118 S. Ct. 481, 139 L. Ed. 2d 433 (1997); 28 U.S.C. §1257(a). In Cox Broadcasting Corp. V. Cohn, 420 U. S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1974), this Court explained the concept of finality:

> Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '(f)inal judgment or decree.' Title 28 U.S.C. 1257 retains this limitation on our power to review cases coming from state courts. The Court has noted that '(c)onsiderations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945).

In this case, the trial court granted the Respondent's motion to suppress physical evidence found in the automobile he was driving. On appeal taken by the State of Florida, the Second District Court of Appeal reversed on the authority of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).- In its opinion reversing the district court, the Florida Supreme Court held that the search of Respondent's vehicle could not be upheld as incident to his arrest outside the vehicle pursuant to Belton. The court held "that Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signalling confrontation with the defendant regardless of whether the defendant has been removed from or has exited the vehicle." Thomas, 761 So. 2d at 1014. The court then found that since the Respondent did not exit the vehicle upon the direction of the law enforcement officer, Belton did not apply. The court remanded the case to the trial court to determine whether the factors in Chimel v. California, 395 U. S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), justified the search of the Respondent's vehicle. The court specifically directed the lower court to determine whether the officer's safety was endangered or whether the preservation of evidence was in jeopardy. Thomas at 1014.

The federal Fourth and Fourteenth Amendment issue of whether or not the search of the vehicle was constitutional has not been resolved in the state court system. In Cox, this Court noted there are at least four categories of cases in which this Court would

consider the determination of the federal issue as "final" even though further proceedings are contemplated in the lower state courts. However, each of these exceptions requires that the federal claim has been finally decided. Also, "[i]n most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date. . ." Cox 420 U.S. at 477. In this case, the federal claim is still undecided and the inquiry demanded upon remand would require the decision of another federal question, i.e., whether the search of the automobile is permissible under this Court's decision in Chimel.

Even if this Court had jurisdiction, Petitioner has not presented any compelling reason why the Court should exercise its jurisdiction. In this case, the Florida Supreme Court properly interpreted this Court's holding in Belton and properly refused to extend the holding in Belton to a situation in which an individual has voluntarily exited his vehicle before the officer confronted the individual or signalled confrontation with the individual. The Florida court refused to apply the "bright-line" rule of Belton in this case in which the probable cause to arrest the defendant did not develop until he was outside the vehicle, and where the officer had no reason to stop or detain the defendant until he was outside of the car.

In Belton, the officer lawfully stopped a car for speeding and arrested the occupants after smelling burnt marijuana and spotting

an envelope inside the car labelled in a way associated with marijuana. The car was searched after the occupants were escorted from the car. The Court in Belton was concerned only with the scope of the search, noting that Chimel limited the search pursuant to arrest to the "area from within which [an arrestee] might gain possession of a weapon or destructible evidence." Chimel 453 U.S. at 457-458. Chimel prohibits the routine search of any room other than that in which the arrest occurs and prohibits the search of desk drawers or other closed or concealed areas in the room itself.

The Belton Court was concerned with the ambiguity inherent in the phrase, "the area within the immediate control of the arrestee" as the it applied to automobiles. Belton 453 U. S. at 459-460. Given these limitations of the scope of a search incident to a lawful arrest, this Court created a "bright line" rule governing the scope of a search of the interior of an automobile incident to a lawful arrest of its occupants. That rule states that "when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

The decision of the Florida Supreme Court in the instant case upholds the "bright-line" rule of Belton and allows an officer to search a car even though an arrestee abandons the car during a pursuit. Without requiring that the officer confront the arrestee or signal confrontation while the arrestee while he is still in the vehicle, the officer and the court's would have a difficult time deciding whether or not the arrestee was a "recent occupant" of the

vehicle. In other words, officers in the field and reviewing courts would have to determine on a case-by-case basis whether the arrestee's occupancy of the vehicle was temporally and spatially related to his arrest.

In Lewis v. United States, 632 A.2d 383, 388 (D.C. 1993), the court explained:

> To extend the definition of "occupant" to include a person who has parked, locked and walked fifteen to twenty feet away from an automobile before being stopped and arrested, and, therefore, to consider that automobile subject to a warrantless search incident to arrest, would, as amicus suggests, indelibly blur the bright-line rule that the Supreme Court painstakingly drew in Belton. Indeed, it would defeat the whole purpose of having a bright-line rule, which, in reality, would be severed, without any limiting principle, from the foundation of its rationale in Chimel. (Citations omitted.)

Furthermore, although at first blush it may seem that the instant opinion conflicts with the decisions of other federal and state courts, a closer examination reveals that this case can be distinguished from many of Petitioner's cited cases on the facts. For example, in United States v. Snook, 88 F.3d 605 (8th Cir. 1996), the officer was aware from a radio dispatch that the defendant had an outstanding warrant before he confronted the defendant. At the time the officer arrived, Snook was just stepping out of his car and the motor was still running. When another officer reached in to shut off the ignition to protect Mr. Snook's property, the officer saw paraphernalia and a concealed weapon in the car.

In United States v. Karlin, 852 F.2d 968 (7th Cir. 1988), cert. denied, 489 U. S. 1021, 109 S. Ct. 1142, 103 L. Ed. 2d 202 (1989), a burglary suspect was apprehended by citizens. When police arrived, the officer found two citizens standing over Karlin who was lying face down on the ground with his foot still inside the open driver's door of a van. The officer then arrested Karlin and placed him in a squad car and searched the van. Karlin argued only that the firearm found in the van should have been suppressed because he was secured in the car a distance away from the van at the time of the search. Karlin did not argue that he was not a "recent occupant" of the vehicle. The Seventh Circuit held that Belton applied even though Karlin was not capable of reaching into the van at the time of the actual search.

In United States v. Franco, 981 F. 2d 470 (10th Cir. 1992), at the time of the defendant's arrest, he was actively involved in an undercover drug deal with a law enforcement officer. He returned to his car during the transaction to obtain the contraband and then after delivery of the contraband to the agent. Probable cause for the arrest was fully developed while the defendant was in the automobile; however, the agent had to complete the transaction before initiating the arrest. The circuit court found it significant that Mr. Franco had access to his vehicle during the course of the illegal conduct and that the vehicle was used to transport the contraband. Id. at 472-473. The court merely declined to hold that the agents had to actually arrest the defendant while still in the vehicle.

In Glasco v. Commonwealth, 257 Va. 433, 513 S.E. 137 (1999), the officer had a reasonable suspicion that the defendant was driving without a license before the defendant voluntarily left his vehicle. Furthermore, officer found contraband on the defendant's person immediately after his arrest.

In this case, the officer was waiting outside a residence in which arrests were being made for narcotics offenses. The officer saw Respondent drive up to the house, park his car in the driveway, and get out of the car. Respondent walked to the rear of the car where the officer met him and asked him his name and if he had a driver's license. A license check revealed an outstanding warrant for probation violation. The officer arrested Respondent and took him into the house. A search of the car revealed four small bags of methamphetamine. Not only did the officer not attempt to confront Respondent until he was outside his vehicle, the officer had no reason to detain Respondent until he was outside, standing at by the trunk of the car. For that reason, the opinion of the Florida Supreme Court correctly interpreted this Court's opinion in Belton.

CONCLUSION

For these reasons, the Respondent respectfully prays that this Court deny the Writ of Certiorari.

Respectfully submitted,

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Case No. 00-391

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

STATE OF FLORIDA, Petitioner,

v.

ROBERT A. THOMAS, Respondent.

APPENDIX TO RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

APPENDIX

PAGE NO.

1. Opinion of the Florida Supreme Court in Thomas v. State, 761 So. 2d 1010 (Fla. 1999). . . A-1

Supreme Court of Florida.

Robert A. THOMAS, Petitioner,
v.
STATE of Florida, Respondent.

No. SC93070.

Oct. 14, 1999.
Rehearing Denied June 8, 2000.

After defendant's vehicle was searched incident to arrest on outstanding warrant, the Circuit Court, Polk County, Robert E. Pyle, J., granted defendant's motion to suppress methamphetamine and drug paraphernalia. The state appealed and the District Court of Appeal, Parker, C.J., 711 So.2d 1241, reversed. On certified conflict, the Supreme Court, Harding, C.J., held that warrantless search of vehicle incident to arrest was not valid absent threat to officer safety or necessity of preservation of evidence.

Decision of District Court of Appeal quashed and case remanded.

Wells, J., filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Arrest ⇐71.1(4.1)
35k71.1(4.1)

Warrantless search of vehicle incident to driver's arrest was not valid, absent threat to officer safety or necessity of preservation of evidence, where police officer's first contact with driver occurred after driver voluntarily exited the vehicle. U.S.C.A. Const.Amend. 4.

[2] Arrest ⇐71.1(4.1)
35k71.1(4.1)

Search of vehicle incident to arrest should not be invalidated merely because the defendant was outside of the automobile when arrested. U.S.C.A. Const.Amend. 4.

[3] Arrest ⇐71.1(4.1)
35k71.1(4.1)

Belton's bright-line rule, allowing search of vehicle incident to arrest, is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile. U.S.C.A. Const.Amend. 4.

***1010** James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Petitioner.

Robert A. Butterworth, Attorney General, Robert J. Krauss, Senior Assistant Attorney General, and John W. Klawikofsky, Assistant Attorney General, Tampa, Florida, for Respondent.

HARDING, C.J.

We have for review State v. Thomas, 711 So.2d 1241 (Fla. 2d DCA 1998), which expressly and directly conflicts with the opinion in State v. Howard, 538 So.2d 1279 (Fla. 5th DCA 1989). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. For the reasons expressed below, we quash the decision of the Second District Court of Appeal in Thomas.

The facts of Thomas are as follows. On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney ***1011** originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest,

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and was brought into the residence and Officer Maney's subsequent search of the vehicle.

Following a hearing, the trial court granted Thomas's motion to suppress based on State v. Howard, 538 So.2d 1279 (Fla. 5th DCA 1989). The district court reversed, relying on New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and held that because the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, the search was lawful because it was incident to the valid arrest of Thomas. See Thomas, 711 So.2d at 1243.

In Howard, the defendant was followed by a police officer who had knowledge of an outstanding warrant for his arrest for a probation violation. Howard drove into the parking lot of a convenience store, and upon exiting his car with a pouch in his hand, he spotted the officer and placed the pouch back into his car and locked the door. After Howard was arrested on the warrant, he then instructed his brother who was present at the scene not to allow the police to search his car. However, the officer took the keys from Howard's pocket and searched the vehicle and found contraband.

The trial court suppressed the evidence and the district court affirmed. The district court held that the officer did not have probable cause for a warrantless search of the car. The district court stressed that Howard had already exited his car and locked it. The district court stated that even though the officer's suspicions may have justifiably been aroused, there was no legitimate need or reason to search Howard's car as incident to his valid arrest. See Howard, 538 So.2d at 1280.

The district court in Thomas distinguished Howard based on the fact that the officer in Howard was in reality conducting a preplanned warrantless search, whereas in Thomas the officer did not know Thomas, nor was he aware of the fact that there was an outstanding warrant for his arrest. In reaching its decision, the district court in Thomas relied on Belton's bright-line rule regarding searches incident to arrests: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (footnote omitted). While we do not question the practicality of this bright-line test, nor its application to arrests that are initiated by the conduct of an officer, we believe there must be a distinction drawn when an individual voluntarily exits his car without provocation from law enforcement personnel and without knowledge of their presence.

In Belton, a New York State policeman was passed by another automobile driving at an excessive rate of speed. The officer gave chase, overtook the speeding vehicle, and ordered its driver to pull over to the side of the road and stop. After comparing the vehicle registration to the driver's licenses of the driver and the three passengers, one of whom was Belton, the officer discovered that none of the men owned the car, nor were they related to the owner. In the course of verifying their identification, the officer smelled marijuana emanating from the vehicle, and also saw an envelope marked "Supergold" on the floor of the car, which he associated with marijuana. The officer then directed the men to get out of the car and placed them under arrest for unlawful possession of marijuana. He opened the envelope, which contained marijuana, searched the passenger ***1012** compartment, and found cocaine in a pocket of a leather jacket found in the car.

The United States Supreme Court in Belton referred to Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), forthe proposition that a lawful custodial arrest justifies a contemporaneous search of an individual without a search warrant. The Court in Chimel concluded that such searches were necessary to (1) remove any weapons that the arrestee might have and (2) prevent the concealment or destruction of evidence. Relying on this reasoning, the Court in Belton held that when an officer has made a lawful arrest of the occupant of a vehicle, he may search the passenger compartment of that vehicle as long as it is in within the narrow time frame incident to the arrest. The Court did not state that the Chimel factors must be established before the vehicle can be searched; rather, the Court set up a bright-line rule to be applied in all cases. Florida's district courts have consistently applied this bright-line principle to analogous situations. See Shaw v. State, 449 So.2d 976 (Fla. 1st DCA 1984) (affirming denial of motion to suppress, even though defendant was handcuffed and placed in the officer's vehicle before the search was conducted); Chapas v. State, 404 So.2d 1102 (Fla. 2d DCA 1981) (upholding Belton search after defendant was ordered out of the car, arrested for driving while intoxicated, and placed in a police vehicle); State v. Valdes, 423 So.2d 944 (Fla. 3d DCA 1982) (holding the search of vehicle justified as

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a contemporaneous incident of the lawful arrest of defendant, notwithstanding that defendant was removed from the vehicle and placed in a nearby police cruiser); State v. Saufley, 574 So.2d 1207 (Fla. 5th DCA 1991) (upholding Belton search where defendant was pursued by an officer with siren on and lights flashing, arrested for driving under the influence, and placed in a patrol car, and two to three minutes later the officer searched the vehicle); see also United States v. White, 871 F.2d 41 (6th Cir.1989) (holding that Belton governs when an arrestee is removed from the car prior to the time of search); United States v. Karlin, 852 F.2d 968, 971-72 (7th Cir.1988); United States v. Cotton, 751 F.2d 1146, 1149 (10th Cir.1985); United States v. McCrady, 774 F.2d 868, 871-72 (8th Cir.1985).

However, when searches occur beyond the scope of Belton's bright-line intent, the factors in Chimel of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful. The Supreme Court addressed the parameters of Belton's application in Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). In Knowles, the defendant was only issued a traffic citation, and was not placed under arrest. Chief Justice Rehnquist, writing for the Court, held that a full search of an automobile pursuant to issuance of a citation for speeding violated the Fourth Amendment. The Court declared:

> Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for the destruction or loss of evidence is not present at all. We decline to do so.

Id. at 118-19, 119 S.Ct. 484. Not finding the circumstances to be analogous to the circumstances that were the foundation to the Belton decision, the Court declined to apply the bright-line test. Id.

In examining the application and limitations of Belton, we believe the Second District Court of Appeal in Chapas was correct in interpreting Belton as "establishing a rule applicable to all cases involving the arrest of a recent occupant of an automobile." See Chapas, 404 So.2d at 1104. However, the court in Chapas also stated that "[i]n this case, as in the Belton case, appellant was the occupant of an automobile who had been removed from the vehicle and placed under arrest." Id. at 1104-05 The district court compared the facts of its case to Belton, found the circumstances to be analogous, and therefore ***1013** applied the bright-line rule. Hence, it can be inferred that the bright-line rule does not apply, as clarified by Knowles, when its application has been extended to a situation not contemplated by the Supreme Court in Belton. Rather, the Chimel factors of threat to officer safety or the necessity of preservation of evidence must be present to validate the search.

In State v. Vanderhorst, 419 So.2d 762 (Fla. 1st DCA 1982), the defendant was arrested for being intoxicated, and a subsequent search of his car revealed four quaaludes. The confrontation with the officer and the subsequent arrest and search were two-and-one-half hours after defendant's vehicle got stuck in the mud. The district court stated:

> Because Belton incorporated within its opinion that language from Chimel limiting the scope of an officer's search which is reasonably incident to a lawful arrest, it follows that unless the arrestee was himself a recent occupant of the vehicle, the Belton rule has no applicability.

Id. at 764. The district court stressed that Chimel 's justification was to deter an attempt made by the arrestee to remove any weapons that might aid in an escape, as well as to prevent the concealment or destruction of evidentiary items. Because the district court did not find the facts to be analogous to Belton, in that the timeliness was lacking, the court then shifted its focus to the concerns of officer safety and evidence preservation, which the court held could not be present at a time so far removed, and accordingly ruled the search was invalid. Again, when the foundation of Belton is extended beyond its original parameters, the bright- line rule is not automatically invoked.

[1] The issue for us to decide in the present case is whether Belton extends to a situation where the first contact the defendant has with the officer occurs after exiting the vehicle. We find the recent analysis of the Sixth Circuit Court of Appeals in United States v. Hudgins, 52 F.3d 115, 119 (6th Cir.1995), persuasive:

> The search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer.
>
> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartments falls within the scope of Belton and

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will be upheld as reasonable. See United States v. Strahan, 984 F.2d 155, 156 (6th Cir.1993).... Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile. See United States v. Thomas, 11 F.3d 620, 628 (6th Cir.1993); United States v. Patterson, 993 F.2d 121, 122-23 (6th Cir.1993) (per curiam); [United States v.] White, 871 F.2d [41], 44 [(6th Cir.1989)]; United States v. Hatfield, 815 F.2d 1068, 1071-72 (6th Cir.1987). However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary. See Strahan, 984 F.2d at 159 (stating that Belton was inapplicable and concluding that the search was unreasonable under Chimel).
(Emphasis added; citations omitted.)

[2] We must caution, however, that in adopting this rationale, this Court is mindful ***1014** that the arrest and subsequent search should not be invalidated merely because the defendant is outside of the automobile. The occupants of a vehicle cannot avoid the consequences of Belton merely by stepping outside of the vehicle as the officers approach. See United States v. Mans, 999 F.2d 966, 968-69 (6th Cir.1993) (upholding Belton search where officer's first verbal contact with defendant was when defendant was outside the car on ground that officer had initiated contact with defendant earlier when defendant knew he was being followed by officer); State v. McLendon, 490 So.2d 1308, 1309 (Fla. 1st DCA 1986) (highlighting the fact that "[t]o distinguish between arrests of persons in the car from arrests of persons recently vacating the car serves to severely diminish the purpose of the Belton decision").

[3] In conclusion, we hold that Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile. Applying the aforementioned analysis to the present situation, the record is clear that the defendant did not exit the vehicle upon the direction of the law enforcement officer. Because Belton does not apply, the trial court must determine whether the factors in Chimel justify the search of Thomas's vehicle. See Hudgins, 52 F.3d at 119 (concluding that where Belton is inapplicable, then "a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary"). Based on the record in front of us, we are unable to ascertain whether Officer Maney's safety was endangered or whether the preservation of the evidence was in jeopardy. Under our interpretation, these findings are critical to a determination of the outcome, and therefore we quash the decision under review and remand for further proceedings consistent with this opinion.

It is so ordered.

SHAW, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion.

QUINCE, J., recused.

WELLS, J., concurring in part and dissenting in part.

I concur in the result in this case because I believe that the United States Supreme Court decision in Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), is a Supreme Court application of the Fourth Amendment to the United States Constitution that is sufficiently analogous to control the specific facts here. In this case there was no reasonable basis related to the vehicle to search Thomas; nor was there an arrest made related to the vehicle.

However, I dissent from the dicta which places serious limitations on New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), that are not within the United States Supreme Court's decision. Pursuant to article I, section 12, we are bound by interpretations in respect to the Fourth Amendment by the United States Supreme Court. In Belton, the court held only that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460, 101 S.Ct. 2860. Belton does not add as a condition "where the law enforcement officer initiates contact with the

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defendant either by actually confronting the defendant or signaling confrontation with the defendant." The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection ***1015** with the vehicle is proximate to the arrest.

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Supreme Court, U.S.
FILED
FEB 20 2001
CLERK

No. 00-391

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

vs.

ROBERT A. THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 2000
CERTIORARI GRANTED JANUARY 8, 2001

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Hearing, Motion to Suppress.....July 21, 1997

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Opinion, Second District Court.....May 15, 1998

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR POLK COUNTY

STATE OF FLORIDA,

Plaintiff,

VS. CASE NO. CF96-01296C-XX,

ROBERT THOMAS,

Defendant.
_____/

MOTION TO SUPPRESS EVIDENCE

COMES NOW, the Defendant, ROBERT THOMAS, by and undersigned attorney, and moves this Court to Suppress the Evidence seized in the above styled cause pursuant to Florida Rule of Criminal Procedure 3.190(h). As grounds, therefore, the undersigned would show unto the Court as follows:

1. The evidence sought to be suppressed is the Methamphetamine, assorted narcotic paraphernalia, any and all evidence listed in paragraph (K) of the State's Discovery Response as it pertains to this Defendant, and any and all statements made by the Defendant after the illegal search by the Sheriff's Department of the vehicle he was driving.

2. The search of the vehicle driven by the Defendant was without a lawful search warrant and was not a search incident to a lawful arrest.

3. The Facts on which this motion is based are as follows:

> (a) On Friday, February 28, 1997, at approximately 9:15p.m., Detectives Maney and Macek went to 1003 Meadow Avenue, Lakeland, Florida, to do a "knock and talk" search of the residence without a search without a search warrant. The Defendant, ROBERT THOMAS, pulled his vehicle into the driveway of the residence and exited his vehicle. The Defendant closed the vehicle's door and walked around to the rear, passenger's side of the vehicle. Det. Maney approached him and asked him for his license. Det. Maney ran a warrants check on the Defendant and, after several minutes, he found out there was a warrant on this Defendant. Det. Maney arrests the Defendant, searches the Defendant, places handcuffs on the Defendant, takes him inside the residence, and then goes back outside to search the vehicle the Defendant's driving Upon searching the vehicle, Det. Maney finds suspected Methamphetamine and narcotic paraphernalia. (Maney Depo pg. 21 - 28 attached)

2. The search of the vehicle was done without the Defendant's consent and was not a search incident to a lawful arrest, so all evidence obtained from it should be suppressed. See State v. Bennett, 516 So. 2d 964 (Fla. 5h DCA 1987), and State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989) .

WHEREFORE, the Defendant, ROBERT THOMAS, prays this Honorable Court will enter an Order suppressing those items of evidence set forth in this Motion

and dismiss the charges levied against him in the above cause.

Respectfully submitted this Monday, June 16; 1997.

BRANDON J. RAFOOL, ESQ.
1519 Third Street SE
Winter Haven, Florida 33880
(941) 299-3339
Florida Bar No. 0961744
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been mailed by U.S. Mail to Hardy Pickard, Assistant State Attorney, P.O. Box 9000, Drawer SA Bartow, Florida 33830, this Monday, June 16, 1997.

BRANDON J. RAFOOL, ESQ.

can't come in, could you have put a unit on the street to observe the residence for a sufficient amount of time to go get a search warrant?

A. If we found marijuana or haven't?

Q. If you have even --

A. There were stems at the door.

Q. I'm talking about if you had not been let inside the house.

A. There was no probable cause at that time for a search warrant.

Q. So, you didn't have probable cause until the door was opened and you were inside the house?

A. Until they found the stems. If she had said no then it wouldn't have been up to me. She asked me what we were doing and I would have told them and they would have called the supervisor and said, hey, this is what we have got, what do you want us to do.

Q. You would agree that you could not have observed any stems or other narcotics from a vantage point outside the front door with the door shut, correct?

A. Correct.

Q. Were you present when Robert Thomas arrived on the scene?

A. He drove up beside me.

Q. Do you recall what he was driving?

A. A white Ford Tempo.

Q. Do you recall what actions the officers at the scene took towards him when he initially pulled up?

A. It was me.

Q. What did you do?

A. I was sitting in my car with the door open and he pulled up to my left. He got out, I got out. He walked around the rear of his car and I'm standing there. And I said, hey, how are you doing, do you have a driver's license. I asked him if he had a driver's license, since he had not committed no infraction for me to command his license. So, I asked him.

Q. Why are you so intent on telling me you asked it rather than commanded it? Is there a difference in your mind?

A. Yes. There is nothing wrong with asking anybody anything, if you ask.

Q. But if a police officer asks somebody something and a regular citizen asks somebody something, isn't it more likely for the citizen to comply with the request of the police officer because of the authority of the officer's badge than the person?

A. That don't matter.

Q. It doesn't matter?

A. That's one of the reasons a person thinks.

Q. Have you in certain circumstances of your sixteen years as a law enforcement officer had the occasion to have been out of uniform and asked somebody for something?

A. Out of uniform?

Q. Yes, sir.

A. Like what.

Q. Just say, you -- you are in a store and you have a question about somebody, and you ask them if they could talk to you about it, and you are out of uniform and you ask them about their identity. Are they going to hand you their identification before they know you are a police officer or not?

A. No.

Q. Okay. But when you have your police officer outfit on, your badge, your gun, your uniform, people are readily going to comply with any request that you make, correct?

A. It depends on what the court rules.

Q. But I'm asking you in your experience as a sixteen-year law enforcement officer.

A. Well, some of them will tell you to get stuffed in a heartbeat.

Q. But most people simply hand over their license when you ask them, when you're wearing your uniform, correct?

A. Correct.

Q And in this situation, you asked him for his license and he hands it to you?

A. I asked him If he had a driver's license.

Q. Did you search or look in his vehicle before he handed you his license?

A. No. I asked him if he had a driver's license and he handed it to me.

Q. And what did you do when you got the license?

A. Bring him up on teletype for a warrant check and license check.

Q. Why is that?

A. Maybe his license was suspended, maybe he had a warrant.

Q. But when you ask him for a license, he wasn't driving the vehicle anymore, was he?

A. No.

Q. And you had no reason to stop for traffic infraction or otherwise, did you?

A. No.

Q. So, just kind of a random thing you wanted to do?

A. I do it all the time.

Q. Why did you do it on this occasion?

A. Because he drove up where we were at.

Q. That was a house with narcotics activity in it?

A. Correct.

Q. And you felt he had some type of narcotics activity in that house or that vehicle, correct?

A. I had no idea.

Q. So what happened then? Tell me what happened once you ran his I.D. on teletype.

A. It came back, his license was good, but he had a warrant, violation of probation.

Q. Okay. When you asked for his license, was he on the passenger side of this Tempo, outside of it?

A. He had pulled up, there was a vehicle in front of him and he walked around towards the back. And I'm standing at the passenger rear of his car and he walked up to me.

Q. So, the door was shut on the Tempo once he got out of it, correct?

A. Correct.

Q. And when he walked up to you, he was at the rear

corner of the passenger side of the Ford Tempo?

A. Correct.

Q. Is it four door or two door car?

A. I think it was a two door.

Q. And you get the license, you run it through, and find out he has a warrant on it. What do you do then?

A. Arrest him.

Q. And then what do you do?

A. Search him and the car.

THE COURT REPORTER: Searched the what of the car? I'm sorry.

A. Him and the car.

Q. And, Detective Maney, did you ask him to search that car?

A. I can't remember.

Q. Okay.

A. I can't -- I don't know the information you're asking.

Q. In your report, had you asked him to search the car you would have put it in there, correct?

A. Yes.

Q. And you have reviewed your report thoroughly here today?

A. Correct.

Q. And it is not in there, is it?

A. No.

Q. So it would be more likely to assume that you didn't ask him to search that vehicle?

A. Macek might have.

Q. But regarding you --

A. I don't remember asking him, no.

Q. Okay. Why did you then search the vehicle?

A. Because he was driving it.

Q. Would that be consent in your opinion to search the interior?

A. Correct.

Q. What did you find in the vehicle, sir?

A. A baggie on the driver's door. I can't exactly say where, but I think it was a holder on the bottom of the door.

Q. Uh-huh.

A. And a Marlboro box in the glove with meth in it.

Q. When you found those items, did Mr. Thomas admit ownership of them?

A. I didn't talk to him after that, he was already inside.

Q. So it would be correct to say that he didn't tell you that those are my drugs, that's my cigarette case or anything placing ownership of the drugs or other illegal items --

A. Correct.

Q. - in his possession?

A. Once he had the warrant and was arrested, I took him inside where Murphy and them were. And I came back outside and then I went back in with the stuff and put it on the pool table and told Murphy this is what I got.

Q. So you arrested him and then brought him in?

A. Right.

Q. And then went back out and searched?

A. Correct.

Q. And did he advise you prior to your arresting him that the car wasn't his?

A. He said it was his aunt and uncle's that live there; that's whose house we were at.

Q. That was Julia and Alan Crall's vehicle?

A. Yes.

Q. And for me to get this straight for the record, there were no narcotics whatsoever found on the actual person? And when I say actual person, I mean his pockets, pants, the clothing of Mr. Thomas on the 28th of February, 1997, correct?

A. I don't believe so.

Q. Okay. What happened after he was placed under arrest? What were your next duties on the scene, sir?

A. Left.

Q. That was it?

A. (Witness nods head.)

Q. You headed on down the road then?

A. To the next one.

MR. RAFOOL: Okay. Detective, I don't have any further questions. But let me read my notes one time to make sure.

[Contained on pp. 19 - 128 of the State Court Record]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR POLK COUNTY

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. CF97-01296A-XX
	)	
ALAN KEITH CRALL,	)	
	)	
Defendant.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. CF97-01296C-XX
	)	
ROBERT A. THOMAS,	)	
	)	
Defendant.	)	
	)	

HEARING HELD ON JULY 21, 1997

BEFORE THE HONORABLE ROBERT PYLE

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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR POLK COUNTY

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. CF97-01296A-XX
	)	
ALAN KEITH CRALL,	)	
	)	
Defendant.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO. CF97-01296C-XX
	)	
ROBERT A. THOMAS,	)	
	)	
Defendant.	)	
	)	

Hearing in the above-styled cause was held on July 21, 1997, at 2:30 p.m., in Courtroom 8-B, Polk County Courthouse, Bartow, Polk County, Florida, before the Honorable Robert Pyle, Judge of the above-styled court.

Appearances were: Hardy 0. Pickard, Esquire, Assistant State Attorney, for the State; Brandon Rafool, Esquire, for the Defendants; the Defendants; the clerk; and the court reporter.

Thereupon, the following proceedings were had and taken:

THE COURT: Are we ready to proceed, gentlemen?

Are we arguing the Thomas and Crall cases combined, or one at a time?

MR. PICKARD: Judge, I would like to argue the Crall case first, separately, because we have a little bit different facts and different law --

THE COURT: Very well.

MR. RAFOOL: - then do Mr. Thomas' case.

THE COURT: All right, sir. Whenever you're ready then, Counselor, let us proceed.

MR. PICKARD: Judge, I would call J.D. Maney.

THE COURT: Very well.

MR. RAFOOL: Judge, again, I'm going to invoke the rule, and ask the other officer to step outside.

THE COURT: All right. Gentlemen -- are there any other witnesses other than these two officers?

MR. RAFOOL: Mine have already stepped out, Your Honor.

THE COURT: All right. Are you familiar with the rule, Officer, or do you want me to explain it?

All right. Hardy, you may proceed.

MR. PICKARD: Thank you, sir.

J.D. MANEY

having been produced as a witness on behalf of the state and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PICKARD:

Q. Tell us your name, please, sir, and spell your last name.

A. J.D. Maney, M-A-N-E-Y.

Q. Your occupation?

A. Detective with the Polk County Sheriff's Office.

Q. What section or unit are you involved with?

A. Narcotics, Canine.

Q. How long have you been in the Narcotics Unit?

A. The last time, seven years. This time, I went back last October.

Q. Let me be sure I get the date right.

On the 28th of February of this year, did you have contact with an Alan Crall?

A. Yes.

Q. At what location?

A. It was on Meadow Avenue off of Hardin Combee in Lakeland.

Q. Who lived there? Whose residence was that?

A. Alan and Julia Crall's.

Q. Okay. Were you there in your capacity as a deputy sheriff?

A. Yes.

Q. Were any other deputies there with you?

A. At the end, there was one, two, three -- four or five more.

Q. When you arrived there initially, were you by yourself or with someone else?

A. I was with my partner, Detective Macek.

Q. Okay. That's the officer that just left the courtroom?

A. Correct.

Q. Okay. About what time of the day or night did you arrive at the Crall residence?

A. It wasn't late. It was after dark, but it wasn't late. It was before 10:00.

Sometime after the sun set, but before 10:00?

A. Yes.

Q. What was the reason for your going there?

A. Me and my partner are the ones that assist all the other units for arrests and things like that. The Narcotics Unit wanted us to go with them, said they had information where some narcotics might be.

Q. You were not specifically in the Narcotics unit at that time?

A. Correct.

Q. Okay. But members of that unit had given you some information?

A. Correct. We're in the Tactical Drug Unit, they call it now, I believe.

Q. What information had you been given that caused you to go to the Crall home?

A. They said that they had information that marijuana was being sold out of it.

Q. Is that essentially all the information you were given at that time?

A. Yes.

Q. What were you requested to do when you got to the Crall home?

A. Knock on the door and talk to the owners of the residence, try to get consent to search.

Q. You were not going there initially to make an arrest?

A. No.

Q. So you and your partner -- or did you and your partner then go to that particular home?

A. Yes.

Q. Were you in uniform?

A. Yes.

Q. Okay. You all in the same vehicle?

A. At that time, yes.

Q. Okay. So you – I assume, you got out of the car, and what did you do?

A. Went up to the door and knocked.

Q. This is the front door?

A. Correct.

Q. Okay. Did someone answer the knock?

A. Julia did.

Q. That's Mr. Crall's wife?

A. Correct.

Q. Was Alan Crall at home at that time?

A. No.

Q. Was anyone there besides his wife?

A. There was a lady sitting on the couch, but I didn't get her name.

Q. All right. So there were two females there when you got there?

A. Yes.

Okay. When Mrs. Crall opened the door, tell us what conversation you had with her.

A. I asked if she owned the house, and she said yes. I introduced myself, Detective Maney with the Sheriff's office, and my partner, Detective Macek; could we come in and talk to her for a minute.

Q. At that point, did you tell her why you were there?

A. No.

Q. You simply asked if you could come in and talk?

A. Correct.

Q. What response did she give you?

A. She said, sure.

Q. So what did you do?

A. We walked in and shut the door. And she sat down in a chair that was to the left of the front door.

Q. All right. You and Detective Macek both entered the house?

A. Yes.

Q. What room are you now in?

A. At the front door. We still stood by the front door to the living room.

Q. With the front door closed behind you?

A. I think ----

Q. If you recall.

A. I think Macek closed it.

Q. Okay. What occurred at this point? You said Ms. Crall sat down; correct?

A. Yes.

Q. What is next said by you or Macek?

A. I told her that we had received information that marijuana was being sold out of the house, and she said it wasn't. She didn't smoke it. Had no idea what I was talking about.

Q. What is said after that?

A. I asked her if she minded if we walked through the house and looked. And the lady that was sitting on the couch was shaking her head no. She said, you don't have to let them do that. And Julia said that she would rather not, because her husband wasn't there.

Q. So she said that she would rather you all not look through the house.

A. Correct.

Q. What do you do at that point?

A. Detective Macek had -- laying by the front door is what appears to be stems of cannabis. It looked like it to him. it looked like it to me. And I told him to test it so he walked out to the car and tested it.

Q. This was something that was laying on the floor?

A. On the carpet by the front door.

Q. Inside the house or outside of the house?

A. Inside.

Q. Sir?

A. Inside.

Q. Inside?

A. Yes.

Q. Did you see what it was that Detective Macek picked up?

A. Yes.

Q. What did it look like to you?

A. It appeared to me, as I've seen it before, the stem of cannabis.

Q. Okay. And you told Detective Macek to do what?

A. To take it to the car and test it.

Q. With a testing kit you all had?

A. Yes, sir.

Q. Did Detective Macek do that?

A. Yes, sir, he did. He came back in, and said it was positive for marijuana.

Q. During the time that Detective Macek -- or let me back up.

How were you able to see this alleged marijuana stem on the floor?

A. There's a light right there.

Q. Okay.

A. I believe it's -- if you come in the door and shut the door and turn around -- I can't remember if there was a light to

the left of the door or to the right of the door, but there was a light -- there was a light somewhere over there.

Q. You could see it just by looking?

A. No. I saw him bent down, and I saw him pick it up.

Okay. So he saw it first?

A. Correct.

Q. Okay. In other words, you didn't have to open drawers or do anything like that in order to see this particular object?

A. No, sir.

Q. It was right on the floor?

A. I didn't notice it until I saw him bending down and I saw him reaching for it. He picked it up and showed it to me, and it looked like it to me.

Q. Okay. Where were you -- or what were you doing while Detective Macek was outside, testing this particular object?

A. I believe I had asked Julia if she had some identification, and I got that from her.

Q. Okay. Then what happened?

A. The test is quick. He came back and said it was positive for cannabis. So then I took Julia out to my car.

Q. What do you mean, you took her out to your car? How did you get her outside?

A. I told her she needed to walk out to my car. I mean, we had found narcotics now. It's her house; she's a suspect.

Q. Okay. Did you basically direct her or tell her, come with me?

A. Pretty much, yes.

Q. Okay. It wasn't, will you please come with me if you want to; it was more of an order than a request? Would

that be correct?

A. I said, you need to come out to my car.

Q. Okay. Did she?

A. Yes.

Q. What occurred when you got her out to car?

A. I had told her, I said, you know, I said, we have information that marijuana is being sold.

And she said that she didn't know about it

But then we find marijuana laying right by her front door.

And she said, well, what can you do now?

And I said, well, we can write up a search warrant and see if the judge will sign it.

Q. What did you say?

A. That's what I told her.

Q. Okay.

A. She said, what can you do now?

Q. So you told her we can get a search warrant?

A. I said, we could write up a search warrant and see if the judge will sign it.

Q. Okay. What is said after that?

A. She said, well, you can go ahead and look.

Q. What did you do then?

A. We went back inside. And I had her sit -- or she walked with us. I had her walk with us. I walked around and looked. And if you go to the right from the living room and back to the right again, there's a room that she said was her office. There was pieces of cannabis scattered all over the floor.

Q. How were you able to see it?

A. You could see it on the floor.

Q. Just by walking?

A. Yes.

Q. Okay. Do you have enough experience in narcotics work that you recognized that's what it was?

A. Yes.

Q. All right. What else did you find, if anything?

A. At that time, we -- I had called the Narcotics Unit, they would handle the case. And they come in. And Julia was still with us. And I kept looking -- I wasn't taking out drawers and scattering everything. I was just -- I may pop a drawer and look, and shut it. Open a closet, look, and shut it. Stuff like that.

Q. Did you find any other narcotics in the house?

A. Went into the bedroom, which she said was her bedroom, and as soon as I opened the door, I could smell it strong. And there was a dresser to the left of the door, I opened the top drawer, and there was some money in it.

To the right of the dresser is a closet. When I opened the closet door, it got even stronger. And there was a large trash bag there. When I opened up the bag, I seen bags of marijuana inside.

As I opened the bag, she said, can you do that?

Q. What did you say?

A. Yes.

Q. Okay. So you found the narcotics in the closet?

A. Correct.

Q. Okay. At what point did her husband come home?

A. Narcotics detectives were there, it was their case. And I vaguely remember that he had called or Julia had called him, and he said he was coming home. And he drove up and parked on the -- there's a field across the church -- or across the street from them. I believe it has a church there. He parked there, and walked up to the house.

Q. Was this after you had found the marijuana in the bedroom?

A. Yes.

Q. Okay. How long are we talking about until he showed up?

A. I would say within thirty minutes after.

Q. Okay. Why was he charged?

A. I don't know. I had nothing more to do with it. The investigation was now the Narcotics Unit's.

Q. Okay.

A. They talked to Mr. Crall and everything.

Q. So as far as interviewing Mr. Crall and ultimately deciding who was going to be charged and who was not going to be charged, that was up to the narcotics detectives --

A. Correct.

Q. -- at the scene?

A. Correct.

Q. Your involvement basically ended when you found the marijuana in the closet?

A. Correct.

Q. Okay. When you searched the house, were you searching it on the theory that you had been given consent to search by Mrs. Crall?

A. Yeah. She told us, you can go ahead and look.

Q. Okay. Had you told her that if she did not consent, you would get a search warrant?

A. No. When she asked me, she said, what can you do now?

And we've done this. We've found narcotics before, and they wouldn't give consent. And the Narcotics Unit would write up a search warrant and see if the judge would sign it. And I told her that. I said, they will write up a search warrant and see if a judge would sign it.

Q. Right.

A. She asked me what we was going to do, and I told her.

Q. And you told her?

A Yes.

Q. And at that point, when you said we will get a search warrant, did you think there was probable cause for a search warrant?

A. We've got them before like that, yes.

Q. Based on what was found inside by Detective Macek?

A. Yes. Yes. I've had them exactly like that and got search warrants. But I did not tell her we were going to. I said we would write up ----

Q. You were trying to answer her question.

A. Correct.

Q. All right. And after you said, we will get a search warrant, that's when she said, what, okay, you can search?

A. You can go ahead and look.

Q. Okay. And that's when you went in and searched?

A. Correct.

Q. You said she went with you?

A. Yes.

Q. Okay. During the time that she was going with you, once you re-entered the house and began your search, did she, being Ms. Crall, at any time ever say, no, I'm not sure I want you to do this, why don't you stop, let's not go ahead with this search?

A. No, sir, she did not.

MR. PICKARD: Okay. That's all, Your Honor.

MR. RAFOOL: Permission to cross-examine, Your Honor.

CROSS-EXAMINATION

BY MR. RAFOOL:

Q. Detective Maney, as you know, my name is Brandon Rafool. And you and I did a deposition in this case; do you recall?

A. I believe.

Q. Okay. Now, when you went to this house on February 28th of 1997, at approximately 9:30 to 10:00 p.m. in the evening, you did not have a search warrant, did you?

A. No.

Q. And the information you received was not personally related to you by a reliable informant, was it?

A. No.

Q. It wasn't even related to you by an anonymous informant?

A. By the Narcotics Unit.

Q. Okay. It was another narcotics officer that related the information to you?

A. Yes.

Q. And do you know whether or not this narcotics

officer has used this source in the past?

A. I have no idea where they got the information from.

Q. Okay. And wasn't it true that that same evening, you had previously went down to the road to search a man's tan Lincoln because you had received information that he would be picking up some pounds of marijuana?

A. Are you referring to Tanglewood?

Q. Yes, sir.

A. Yes.

Q. How long before the search at Meadow Avenue did you conduct a knock-and-talk search at Tanglewood?

A. I don't know. You didn't -- I have it on that subpoena -- I don't have that report here.

Q. And you have no independent recollection?

A. I would have to get the report and tell you the exact time we were on Tanglewood.

Q. Okay. Do you recall? Was it an hour before?

A. I have no idea.

Q. A day before?

A. It was that evening.

Q. That evening?

A. Correct.

Q. Dark time; correct?

A. I believe so, yes.

Q. Okay. And you would agree with me in February, it's getting dark approximately 7:00 in the evening?

A. No idea.

Q. Okay. So you get this information about there being pounds of marijuana at the Tanglewood, but when you stop this tan Lincoln, you find nowhere close to several pounds of marijuana; correct?

A. I didn't stop the tan Lincoln.

Q. Did you search the tan Lincoln?

A. On Tanglewood, yes.

Q. And did you find pounds of marijuana?

A. No.

Q. So the information you received about Tanglewood is obviously incorrect?

A. Where do you get the idea that I had received that he had pounds of marijuana?

Q. Are you saying you did not receive that information that evening?

A. Pounds of marijuana?

Q. A pound of marijuana.

A. It was a pound.

Q. Okay. You did receive information that evening that this man on Tanglewood would have a pound of marijuana?

A. From the Narcotics Unit.

Q. Okay. And you found out that that information was incorrect?

A. He could have got rid of it by the time we got there.

Q. But you would agree with me that there was nowhere close to a pound of marijuana when you did a search of it?

A. What we found, no.

Q. Okay. So then who requested you -- what officer requested you to go to Meadow Avenue?

A. It might have been Detective Murphy.

Q. Okay. And did he specifically tell you to do a knock-and-talk there?

A. Yes.

Q. What is a knock-and-talk, sir?

A. Knock on the door, talk to the owner, try and get consent to search.

Q. Okay. The whole purpose of doing a knock-and-talk is to try to get consent; correct?

A. Correct.

Q. And you will agree with me that you did not have enough probable cause to get a search warrant?

A. Which place?

Q. Meadow Avenue.

A. After when?

Q. After you received the direction from your supervisor to go there and do a knock-and-talk search.

A. At that time, no.

Q. Okay. How long have you been with the SIS now, this term -- this tour of duty?

A. This time?

Q. Yes, sir.

A. Last October.

Q. Okay. How many search warrants have you participated in since you were there in October of '96, to today's date?

A. I have no idea.

Q. Less than ----

A. A lot.

Q. Less than ten?

A. No, more than ten.

Q. Say ten to twenty?

A. Twenty to thirty.

Q. Okay. Twenty to thirty search warrants.

A. Rough guess.

Q. That's fine. Now, since October of '96, how many knock-and-talks have you done on an average week?

A. Since I went out there this time?

Q. Yes, sir.

A. Fifteen.

Q. Fifteen a week?

A. Easy. If we're working.

Q. If you're working?

A. Yeah.

Q. So when you're working, you would do approximately sixty a month of these knock-and-talks?

A. No. If we're working, a lot of times, we are assisting

other units.

Q. Okay. How many -- on an average each month, how many would you say you've done?

A. I have no idea. I don't count them.

Q. Do you recall telling me in a deposition that you did approximately five to ten a week?

A. Might have.

Q. So you would agree with me, then, if I made a statement that the amount of knock-and-talks you're doing to find narcotics greatly surpasses any search warrants you're applying for and/or helping execute since your tour in October of '96?

A. Correct.

Q. In fact, it's pretty much, what, 99 percent of your house search cases are being made on them?

A. Correct.

Q. And you knew when you went up to 1003 Meadow Avenue, that you were going to do a knock-and-talk to get consent to search for narcotics?

A. Correct.

Q. And you were, in fact, told to do that by your supervisor?

A. No, the supervisor wasn't there.

Q. Were you told prior to do that? It's my understanding from your testimony that your supervisor told you to go down to that residence to do a knock-and-talk to get consent.

A. There was no supervisor there.

Q. Who told you to do that?

A. Another narcotics officer. I believe it was Murphy.

Q. Okay. So one of your fellow narcotics officers asked you --

A. Correct.

Q. -- to do the knock-and-talk?

A. Correct.

Q. So before you pulled into that driveway, that was your intent and purpose; correct?

A. Correct.

Q. Now, when you pulled into the driveway, you had Macek with you?

A. Yeah.

Q. Detective Macek?

A. Yes.

Q. Did you have your narcotics dog?

A. I believe in my depo I said yes, but I don't believe I did.

Q. Were you wearing the outfit you're wearing in here today --

A. Yes.

Q. -- which is a Sheriff's Office uniform with your name across it, a star on the front, and "Sheriff" on the back?

A. Yes.

Q. And in your patrol cruiser or your patrol car or undercover car, whatever it is, you carry around with you consent-to-search forms; correct?

A. I may have one or two.

Q. And in February of 1997, you did, in fact, have one or two?

A. Might have.

Q. Did you have a tape recorder with you in the vehicle on February, 1997?

A. In the vehicle?

Q. Yes.

A. Three of them.

Q. And you, specifically on February 28th, 1997, had three tape recorders in your car; correct?

A. Two tape recorders and a wireless system.

Q. Okay. And you didn't tape record any of the conversations you had with Ms. Crall inside the residence or outside the residence?

A. No.

Q. So this court and I have no way of knowing what actually was said by her or by you when you purportedly got her consent to search her residence?

A. I have told you what was said.

Q. Okay. But other than your testimony?

A. Correct.

Q. And it's also correct that Detective Macek was not with you outside the residence when she purportedly gave consent to search?

A. Correct.

Q. Let's talk about your knocking on the door. You've testified earlier that you knocked on the door; correct?

A. Correct.

Q. You don't say anything when you knock on that door, do you?

A. No.

Q. In fact, you don't say anything or identify yourself by

a name until the door is opened?

A. Correct.

Q. And verbatim, you tell the lady that opens the door, I'm Detective Maney, this is Detective Macek, can we come in and talk to you a minute about something?

A. Basically, yes.

Q. Okay. You didn't tell her that you were Narcotics Officer Maney, did you?

A. No, I didn't.

Q. And you didn't tell her that this is Narcotics Officer Macek, did you?

A. No.

Q. And you didn't tell her that your narcotics officer buddy asked you to gain consent to search her residence, did you?

A. No.

Q. And you didn't tell her that you believed there were narcotics inside the residence, did you?

A. At the time, no.

Q. Okay. So you just told her you wanted to talk about something?

A. Correct.

Q. For all she knew, it could have been her husband in an accident, and you were just following up on it?

A. If you say so.

Q. Do you agree with me then?

A. I have no idea what she's thinking.

Q. You have no idea what she's thinking; correct?

A. Correct.

Q. And you didn't try to give her a purpose at the door for you being there, other than to say you wanted to come in and talk about something?

A. Correct.

Q. You walked inside, knowing that you want to search this residence for marijuana?

A. Correct.

Q. You and Macek are inside. He takes out -- does he take out his flashlight?

A. He might have had it out.

Q. And he has got his flashlight out, looking around the ground for any type of evidence, isn't he?

A. That might be the light I saw.

Q. Okay. And this is all prior to her ever saying, go

ahead and look, isn't it?

A. Correct.

Q. And, in fact, when you asked her and you stated your purpose once past the threshold, that you were here to search for narcotics, she said, no, not until my husband -- no, because my husband is not here.

A. Correct.

Q. She just denied you consent; correct?

A. Correct.

Q. And you stayed in her residence, didn't you?

A. Macek had found the marijuana by then.

Q. Macek found the marijuana before she said, no, you cannot look?

A. During that time, because I turned around when I saw him moving, he bent down and picked it up.

Q. Well, did you -- did she tell you, no, you can't do a search prior to you turning around?

A. I don't recall.

Q. Okay. You don't recall.

But you do agree with me that she told you, no, you cannot look?

A. Correct.

Q. And you do agree with me that a person's home is their castle for Fourth Amendment purposes?

A. Correct.

Q. And you're well versed in federal case law and state case law, sir?

A. Correct.

Q. But yet you insisted and you did stay in her residence after she told you no?

A. She didn't tell us to leave.

Q. But she didn't tell you to stay, did she?

A. We weren't there that long.

Q. But she didn't tell you to stay, did she?

A. No.

Q. Now, Detective Macek takes this marijuana stem outside; correct?

A. Correct.

Q. What time elapsed from the time he picked this marijuana stem up and took it outside, and then came back inside?

A. It was quick.

Q. Four minutes?

A. Less.

Q. Two?

A. Less, probably.

Q. You're telling me it took less than two minutes for him to pick up marijuana, walk outside, open the trunk of the vehicle, put it in a Valtox test, shake the thing around, and bring it back inside and tell you it was positive.

A. Probably, yes.

Q. Was it more than a minute?

A. Maybe. I didn't time it.

Q. What were you doing for this minute to two minutes that you were inside her residence?

A. Waiting to see if it was positive.

Q. But you didn't leave, did you?

A. No.

Q. Didn't wait outside?

A. No.

Q. Was she free to leave?

A. Yes.

Q. When the -- when I asked you if she was free to leave, you said yes. That's your testimony here today?

A. At that time, yes.

Q. Okay. Let me ask you one question. It's her house, where is she going to leave to?

MR. PICKARD: Objection. That's argumentative.

THE COURT: Sustained.

Q. (By Mr. Rafool) Now, when -- when Macek brings back in the marijuana stems, do you place Ms. Crall under arrest?

A. She wasn't free to leave at that time, but I don't know if I handcuffed her yet.

Q. Okay. When did you handcuff her?

A. I can't remember if I did out at the car or not.

Q. Okay. And you'll agree with me that by the time -- but during the time that you took her outside, she still hadn't consented to search this residence?

A. She had not.

Q. She had not?

A. Correct.

Q. And you testified earlier that the consent was when you were by your patrol car?

A. At the trunk.

Q. And this is the same patrol car that in the trunk you carry consent-to-search forms?

A. If I have some.

Q. Okay. Macek will know what's in your trunk, won't he?

A. Probably not. He knows where the tests are, and the affidavits

Q. Okay. But you didn't, by the trunk, take out a consent-to-search form and have her review and sign it, did you?

A. No, I took out an affidavit.

Q. What kind of affidavit?

A. An arrest affidavit.

Q. Okay. So she was under arrest? Yes?

A. I started the affidavit and called the Narcotics Unit in, and it's up to them.

Q. Was she under arrest when she was by your trunk?

A. She wasn't free to leave.

Q. And you didn't read her Miranda then, did you?

A. No, I didn't.

Q. You didn't tell her she had a right to an attorney, did you?

A. No, I didn't.

Q. You didn't tell her that she had a right not to allow you to search the residence, did you?

A. No, I didn't.

Q. And it is very clear that she didn't understand what was going on when she was by the rear of that trunk; correct?

A. I explained it the best I can when she asked.

Q. Okay. But she still followed up that question, what can we do now?

A. Correct.

Q. And you're an officer, and you testified earlier that you have knowledge of federal case law and state case law regarding consent and searches and seizures?

A. I went through schools about it, yes, sir.

Q. And there's a high probability that you had a consent-to-search form in back of that trunk, didn't you?

A. I never used one.

Q. But you didn't take one out and let her look at it, to give her a full-blown explanation of what her rights were on February 28th, 1997?

A. Nothing says I have to.

Q. Okay. But you, as an officer, don't feel you have to, do you?

A. We've had lawyers that told us there's nothing required they have to sign a consent-to-search.

Q. You've had lawyers tell you that?

A. The interdiction school in Tampa.

Q. Okay. And your specific words to her outside were: We can write up a search warrant to see if a judge will sign it?

A. Correct.

Q. And you were wearing your badge with your Sheriff's Department insignia on the back, with your gun on your side, next to your patrol car; correct?

A. Correct.

Q. And she was very intimidated, wasn't she?

A. I have no idea.

Q. Did she act like she knew what was going on?

A. I have no idea.

Q. Okay. Now, Detective Macek was inside the entire time; correct?

A. At the front door, yes.

Q. And how long were you by the back of your vehicle?

A. A couple of minutes.

Q. And Macek wasn't outside when Ms. Crall allegedly said to you, you can go ahead and look, was he?

A. No.

Q. He could have been, couldn't he?

A. Why?

Q. To report what she said about whether or not she gave consent.

A. We found marijuana by the front door. I had him stand by the front door.

Q. But you didn't have any -- you didn't tape record the purported consent or have anybody verify it other than yourself?

A. Correct.

Q. Now, when you go inside, you walk through the front door, wasn't Ms. Crall just kind of just hanging her head down, looking down?

A. I have no idea.

Q. And she was handcuffed, correct, when you took her back in the residence?

A. She might have been.

Q. Okay. And let me back up a minute. I forgot one point.

When you were in the residence, there was a female on the couch that told her and told you that this wasn't right, that she didn't have to give -- allow you to search?

A. Correct.

Q. But you took Ms. Crall outside to get the consent, didn't you?

A. Hoping she would give us consent, yes.

Q. You were hoping she would give -- would give you consent?

A. It didn't matter if she didn't. We would have wrote up a search warrant and tried to get a judge to sign it.

Q. You took her outside, hoping she would give her consent, away from her friend that could help her make this decision; isn't that true?

A. I was hoping she would say yes. Yeah, that is correct.

Q. Okay. Now, you go back inside, and you find marijuana where?

A. In the room that she says is her office, the bedroom.

Q. When you were inside, you testified earlier, when Mr. Pickard asked you the question, that you did not -- that she never told you not to look in anything inside the house. I mean

certain areas inside the house.

A. One of the things she said when I started opening the bag, she said, can you do that?

Q. And what did you tell her?

A. I said, yes, I can.

Q. You made a legal -- you made a conclusion that you could open a closed bag that was in a closed closet?

A. She said we could look.

Q. She said you could look when you were out by the car?

A. Correct.

Q. But then when you go inside the room, there's a closet that's closed; correct?

A. Correct.

Q. And you opened that closet without her permission?

A. Correct.

Q. And you then take out a bag. What kind of bag?

A. Trash bag.

Q. Black trash bag?

A. Take it out, it's there.

Q. Black trash bag?

A. I believe it was black, yes.

Q. Not able to see through it; correct?

A. Correct.

Q. And you untie the knot holding it, or is there a twist tie?

A. No.

Q. Just -- how is it secured?

A. Just laying there.

Q. And you take that out of the closet. And she asks you, can you do that?

A. I didn't take it out. I opened it up and looked in it.

Q. And she asked you, can you do that?

A. Yes.

Q. And you say, yes?

A. She's asking as I'm opening it. I see the marijuana.

Q. But you didn't stop opening it and explain to her that you had a ----

A. No, I did not.

Q. And you didn't tell her that she had a right to tell you, no, you can't open that bag?

A. Correct.

Q. And that's the marijuana that you collected that my client is being charged with?

A. I didn't collect it.

Q. Who collected it?

A. I believe it was Detective Murphy.

Q. Where was marijuana found that afternoon -- in the evening?

A. In the room that she said was her office.

Q. Did you place her under arrest, or did another detective?

A. I might have at the car. I believe -- I can't say for sure.

Q. Did Alan Crall ever give you consent to search his residence?

A. I never talked to him.

Q. And in your opinion, the basis for your search in this case and seizure of the marijuana was her consent?

A. Correct.

MR. RAFOOL: Nothing further.

REDIRECT EXAMINATION

BY MR. PICKARD:

Q. Detective Maney, when you took Mrs. Crall out to your car and you told her that you could get a search warrant when she asked you what happens next, if she had not given you consent and said you can't go back in, what would you have done?

A. Since it was her house, she was the owner, and we had found narcotics, I would have kept her with me. She wouldn't have been free to leave. And the Narcotics Unit would have wrote up a search warrant to try to get a judge to sign it.

Q. And I think you said before, you have encountered situations like this before?

A. Exactly like this.

Q. And search warrants have been obtained?

A. Yes.

Q. All right. So was it your feeling that regardless of whether she had given you consent ----

MR. RAFOOL: Judge, I'm going to object. I think this has been asked and answered through the direct and cross, and I don't see ----

THE COURT: Overruled.

Q. (By Mr. Pickard) That regardless of whether she gave consent, by the finding of that marijuana in the living room,

that house was going to be searched eventually, whether by consent or whether by search warrant later on.

A. If she had denied it or said no, then it would have been up to the supervisor and he probably would have had a search warrant wrote up.

Q. Okay. And the marijuana in the closet would have been found pursuant to the search warrant?

A. Correct.

MR. PICKARD: That's all.

THE COURT: Thank you, sir.

(Witness excused.)

THE COURT: Next witness.

MR. PICKARD: Detective Macek.

JAMES MACEK

having been produced as a witness on behalf of the state and having been first duly sworn, testified as follows:

THE COURT: You may proceed, Counselor.

DIRECT EXAMINATION

BY MR. PICKARD:

Q. Tell us your name, please, sir, and spell your last name.

A. Detective James Macek, M-A-C-E-K.

Q. Your occupation?

A. Detective with the Polk County Sheriff's Office, assigned to the Tactical Drug Unit.

Q. How long have you been with that unit?

A. Since February of this year.

Q. On February 28th of this year, did you go to the home of Mr. and Mrs. Crall?

A. Yes, I did.

Q. Where is that?

A. It is located at 1003 Meadow Avenue, in Lakeland, Florida.

Q. Who did you go there with?

A. Detective Maney.

Q. And what was the purpose of you and Detective Maney going there?

A. Making contact with the occupants of the residence in regards to possible marijuana being dealt out of their residence.

Q. Okay. Where had you received that information?

A. Detective Maney had received the information.

Q. From who, if you know?

A. One of our narcotics detectives.

Q. What was your game plan, so to speak, when you got to the house? What were you going to do?

A. Knock on the door and make contact with the people inside, and speak to them about the information we had received, and ask them if we could take a look around, make sure whether there was or wasn't any illegal narcotics in the residence.

Q. Was it your intent or hope to get consent to search?

A. Yes.

Q. Okay. Tell us what happened when you and Detective Maney arrived at the residence?

A. We arrived at the residence, we both went up to the front door.

Detective Maney knocked on the front door.

A white female, Mrs. Crall, answered the door.

Detective Maney asked if we could come in, and talk to her.

She said, sure.

We walked inside.

Detective Maney started explaining to her why we were

there.

While he was doing that, I looked down at my feet, and I observed a couple of pieces of cannabis stem.

Q. How did you know that's what it was?

A. I didn't know exactly at first. It looked familiar to the same as normal cannabis stubs I've seen in the past. I picked them up and showed them to Detective Maney, at which time he asked me to go conduct a field test on the stem.

Q. How were you able to see this particular object?

A. I looked down and saw it. And then I used my flashlight, and I shined my flashlight down. And, you know, that's when I observed it clearly.

Q. What room of the house were you in?

A. I was right in the doorway. The door was right behind me. It was the living room area. We walked in, and I was standing right there by the door.

Q. So it was laying on the floor inside the front door?

A. Correct.

Q. Was the front door open or shut, or do you recall?

A. I don't recall.

Q. Okay. Was it dark in that room?

A. It was dimly lit.

Q. All right. How long have you worked in the Narcotics Unit as of that time?

A. Twenty-five days. I started in February 3rd, I believe it was.

Q. How long have you been with the Sheriff's Office?

A. About two years, nine months.

Q. Okay. Had you run into marijuana before?

A. Yes, I have.

Q. Okay. Is that what you thought this was when you picked it up?

A. Yes.

Q. But you showed it to Detective Maney for confirmation?

A. Correct.

Q. You say you were then instructed by him to go run a test?

A. Correct.

Q. What did you do?

A. I went out to the vehicle, and conducted a presumptive test, field test, with the marijuana test kit, at which time, it showed positive for cannabis.

I then went inside, showed Detective Maney the test kit,

and advised him it had tested positive.

Q. How long would you say that took?

A. The test itself? About a minute, minute and a half.

Q. Okay. Was Detective Maney still inside when you had returned?

A. Yes. Yes.

Q. Okay. What occurred after you told Detective Maney it was positive?

A. Detective Maney then asked Ms. Crall to step out with him, outside. I remained inside. There were several other people inside the residence. I stayed at the door.

Q. Who else was inside?

A. There was a white female, and I believe the children of the Cralls or a child.

Q. Okay. Were you communicating or conversing with them while you were inside?

A. No.

Q. You were just standing there?

A. Correct.

Q. So you did not hear the conversation outside between Mrs. Crall and Detective Maney?

A. No, I did not.

Q. What's the next thing that occurred after Detective Maney left the house with Mrs. Crall?

A. He then, again, reentered the residence with Ms. Crall. He advised me that he had obtained a consent to search from Ms. Crall, at which time he began to search the residence. I believe he located some more marijuana in the residence, small fragments in another room, office room or something.

Q. How long were they outside, again, if you have any sort of remembrance or recollection?

A. It wasn't too long.

Q. Okay.

A. A couple of minutes, maybe. I honestly don't remember.

Q. Was Mrs. Crall with him when he came back inside?

A. Yeah, they came back in together.

Q. And Detective Maney said he had received a consent to search?

A. Correct.

Q. Okay. Did Ms. Crall speak up and say, no, that's not right, I haven't given consent to search?

A. (Shakes head.)

Q. No?

A. No.

Q. Did you participate in the search with Detective Maney?

A. I searched certain areas. I didn't locate anything further.

Detective Maney, like I said, located a little bit of -- I assume it was residue in an office area. And then later on, he located a large amount in the master bedroom.

Q. Okay. You were not with him when he actually did that?

A. When he actually located it, no, I was not.

MR. PICKARD: Okay. That's all.

MR. RAFOOL: May it please the court.

THE COURT: You may inquire, Counselor.

CROSS-EXAMINATION

BY MR. RAFOOL:

Q. Detective Macek, as you previously remember from a deposition, my name is Brandon Rafool, and I represent Mr. Crall.

A. (Nods head.)

Q. Just for the record, there were no search warrant being served by either you or Detective Maney on this evening of February 28th, 1998?

A. Correct.

Q. And you did not have any arrest warrants that evening, did you?

A. No.

Q. Now, the knock -- is the knock on the door by Detective Maney?

A. Correct.

Q. And he does not say anything when he knocks; correct?

A. No.

Q. He waits until the door opens and just simply says, I'm Detective Maney, this is Detective Macek, can we come inside for a minute and talk to you?

A. Something to that effect, yes.

Q. Okay. But specifically, there's nothing ever said that you are a narcotics officer and he's a narcotics officer, and that you're there to search the residence for narcotics?

A. No.

Q. Okay. So y'all's admittance past the threshold of the door was under the premise that you were going to be just talking to Ms. Crall; correct?

A. Correct.

Q. And you and Maney - excuse me. And you knew, sir, prior to even pulling into the driveway of this residence that a narcotics officer had requested y'all to do a knock-and-talk search?

A. He asked us if we could go do one.

Q. Okay.

A. Make contact with the people there.

Q. And a knock-and-talk search, sir, is intended to gain consent from the occupants of a house so that you can search for narcotics; correct?

A. Correct.

Q. And you knew that prior to February 28th, 1997 at 10:00 p.m., when you approached Mr. and Mrs. Crall's residence?

A. Yeah.

Q. And, in fact, you've been in the SIS division since February 3rd of 1997?

A. Correct.

Q. And, in fact, since you've been in that division

Detective Maney has schooled you on the art of a knock-and-talk search; correct?

A. Pretty much.

Q. And before you were with that division, you never had occasion to do a knock-and-talk, did you?

A. No, not really. I was in Patrol.

Q. And how many years were you in Patrol?

A. Since February -- since October of '94.

Q. Okay. So from October of '94, to February of '97 is approximately two years-plus?

A. Correct.

Q. You never did any knock-and-talks then?

A. No.

Q. You got to the unit with Detective Maney, and he taught you how to do them, didn't he?

A. Correct.

Q. And, in fact, from February 3rd, 1997, until the date you gave me at deposition on May 23rd, 1997, you estimated that you were doing anywhere from 10 to 25 knock-and-talk searches a week?

A. Correct.

Q. And you also estimated that you had not prepared or drew up any search warrants at all?

A. Correct.

Q. So you would agree with me that well over 99 percent of any searches of residences you and Detective Maney do is through what's called a knock-and-talk search?

A. Correct.

Q. And when you entered the residence, was your flashlight already out of its case?

A. I don't have a case for my flashlight. It was in my hand; correct.

Q. It was in your hand, and it was illuminated; correct?

A. No, it was not.

Q. Okay. When did you illuminate your flashlight?

A. When I looked down and saw the -- what I believed to be cannabis on the floor.

Q. And you will agree with me that the cannabis stems that you found inside the residence could not be seen from outside the residence threshold?

A. Correct.

Q. And didn't Mrs. Crall state that she would not allow a search because her husband was not home, when y'all were inside the residence?

A. Yes, she did.

Q. And, in fact, on February 28, 1997, you never heard her consent to any search whatsoever, did you?

A. Correct.

Q. And you were relying on whatever your partner, Detective Maney, said about a consent to search?

A. Correct.

Q. How long did it take for you to test the marijuana and come back inside with it? Approximately two minutes?

A. Within that time, yes.

Q. How long was it between the time you knocked on the door -- excuse me -- the time Detective Maney knocked on the door and when Ms. Crall came back inside, allegedly having given consent to Detective Maney to search?

A. From the moment we first made contact with her, to the moment -- I honestly couldn't tell you.

Q. And you'll agree with me that the patrol car that you and Detective Maney ride in contains consent-to-search forms in the trunk?

A. Yeah. Yes, it does.

Q. Okay. Have you used any of those, ever?

A. No.

Q. And it's not your practice to use those?

A. No.

Q. And you'll agree with me that when Maney was outside with Ms. Crall, he was standing right next to the trunk of the vehicle, which was open, because you had taken the Valtox testing kit out of it?

A. I had taken it out. When he was out there, I don't know where he was standing.

Q. Okay. Was the trunk open when he was outside?

A. No.

Q. Was the Valtox test kit kept in the trunk?

A. Yes.

Q. It would have been very easy for you to grab a consent form, along with that test kit, wouldn't it have been?

A. If I was going to use one.

Q. Did you read Ms. Crall her Miranda rights prior to mister -- or, excuse me -- Detective Maney taking her outside in handcuffs?

A. Did I?

Q. Yes.

A. Not that I recall.

Q. Okay. Did Detective Maney take her outside in handcuffs prior to him getting the consent from her?

A. I don't recall.

Q. When you were inside the house initially, there was a white female on the couch?

A. Yes, there was.

Q. And she advised Ms. Crall and y'all that it's not right, there shouldn't be a search without -- she shouldn't let y'all do a search?

A. She said, it's not right, something to that effect. I don't know exactly what the words were.

Q. Okay. And after that was said, Detective Maney took Ms. Crall outside, away from this female; correct?

A. After I come in with the test kit?

Q. Yes.

A. He had taken her out.

Q. And he didn't let this female -- or you didn't let this white female go outside with Ms. Crall, did you?

A. I didn't tell her she couldn't. I didn't tell her she could.

Q. But she didn't go outside?

A. No, she didn't.

Q. And you weren't privy to any conversations out at the car between Detective Maney and Ms. Crall, were you?

A. No, I was not.

Q. And in the information received prior to y'all's knock-and-talk, nobody ever said that Julia Crall or Alan Crall were the individuals selling narcotics, did they?

A. Not to my knowledge.

Q. Okay. And you took -- now, you took -- you picked up some marijuana stems on the floor?

A. Correct.

Q. And did you ask permission to take those outside?

A. No, I didn't.

Q. You feel you don't need permission; correct?

A. Not at that point.

Q. And you picked them up inside the residence, across the threshold?

A. Correct.

Q. Were you privy to any conversations where Detective Maney talked about writing up a search warrant?

A. No.

Q. Were you inside when Ms. Crall and Detective Maney

went inside the bedroom and observed a partially-closed closet where the marijuana was later found?

A. I was inside, I believe. At the time, I wasn't with them.

Q. So you don't have any information whatsoever regarding what happened between her and Detective Maney outside that closet?

A. No, I couldn't tell you.

MR. RAFOOL: I have no further questions.

Thank you, Detective Macek.

MR. PICKARD: No redirect, Your Honor. And I have no other witnesses.

THE COURT: All right.

(Witness excused.)

MR. RAFOOL: Your Honor, I would like to call ----

THE COURT: Argument?

MR. RAFOOL: I would like to call three witnesses first.

THE COURT: Very well.

MR. RAFOOL: The first would be Julia Crall. She's outside.

JULIA CRALL

Having been produced as a witness on behalf of the defense and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAFOOL:

Q. Ms. Crall, please state your name for the record.

A. Julia Ethel Crall.

Q. Okay. Do you recall an incident on February 28th, 1997, at approximately 9:30 in the evening, wherein some police officers, detectives from the Sheriff's Department, knocked on your door at 1003 Meadow Avenue?

A. Yes.

Q .Did they say anything when they knocked on the door?

A. No, sir.

THE COURT: Excuse me. You're talking ----

THE WITNESS: I'm sorry.

THE COURT: He's asking the questions. You're talking to me, so please speak so I can hear you.

THE WITNESS: Okay. I'm sorry.

Q. (By Mr. Rafool) Was there anything said when the

knock came to the door?

A. No, sir.

Q. What happened after the knock was at the door? What did you do next?

A. I opened the hard door. Then the two police officers had the storm door open already. And they told me that they -- they had something they needed to talk to me about. And that's whenever he put -- the one -- the front man in the Canine Unit put his foot between my feet, and then came in on me.

Q. Okay. Did you invite them in at the threshold?

A. No, sir.

Q. Did he tell you what purpose he was there, other than I need to talk to you about something?

A. No, sir, not until after he had gotten in and I had sat down.

Q. Okay.

A. I thought that they were there to tell me my husband had gotten in a wreck. He was with his sister in emergency surgery in Haines City.

Q. Have you ever had police officers come to the door of your house before?

A. No, sir.

Q. Okay. Did he tell you he had a search warrant?

A. No, sir.

Q. Did he tell you he had an arrest warrant?

A. No, sir.

Q. So you sit back on the couch. And who is in the room with you?

A. Nicki Thomas and my two children.

Q. What does the officer tell you?

A. After we had -- he had already came in the house, and I was sitting down, he told me that he had someone tell him that they smelled smoke coming from my house. And they wanted to know if I could let them search.

Q. And what did you tell them?

A. I told them, no, that I wanted them to wait until my husband got home.

Q. Okay. And was your husband home?

A. No, sir.

Q. What happened after that?

A. Then they said that they had found a stem on the floor.

Q. Who said that? Which officer?

A. Macek.

Q. Macek?

A. Uh-huh.

Q. And did you tell them, no, you cannot search, prior to Macek saying he found the stem?

A. Yes, sir.

Q. What did Macek do with the stem?

A. He said he took it outside to test it.

Q. Okay. And he brought it back inside?

A. Yes, sir.

Q. Did you give him permission to take anything out of your house?

A. No, sir. There was no ask -- no one asked.

Q. Ma'am, did Macek talk to you after he came back inside, or was it Detective Maney talking to you?

A. Detective Maney.

Q. What did he do -- what did he say to you once Macek came back inside?

A. He shook the vial with orange liquid in it and said that it would check positive, and for me to stand up and turn around, I was under arrest.

Q. Did he place handcuffs on you?

A. No, sir. He asked Macek for a pair, and he said he didn't have any. He used them up at the last place. And that's when Maney asked me to walk outside to get handcuffs.

Q. Okay. Did you feel you were free to leave at that point:?

A. No, sir.

Q. Did he read you your Miranda rights --

A. No, sir.

Q. -- at any time that evening?

A. No, sir.

Q. Did he advise you when you were walking outside or by the car that you had a right to an attorney?

A. No, sir.

Q. Were you ever advised that anything you would say could be used against you in a court at a later date?

A. By Maney, no, sir.

Q. Were you advised by any officers prior to the purported -- the alleged consent to search your residence?

A. An hour and a half after I was handcuffed, Summers read them to me in my son's room.

Q. Okay. Now, were you advised that -- by Maney, that you had a right to refuse to consent in your residence?

A. No, sir.

Q. Did he ever show you any consent-to-search forms?

A. No, sir.

Q. Okay. Do you know whether or not you have to allow officers to search your residence if they come knock on your door?

A. No, sir.

Q. Do you have any ideas about that whatsoever?

A. I'm not clear on my rights on that point.

Q. Okay. And did any of these officers explain it to you?

A. No, sir.

Q. Now, you're outside next to the car with Detective Maney, and he's telling you he's going to arrest you for possession of marijuana?

A. Yes, sir.

Q. And you ask him the question: What can we do now? Correct?

A. I didn't -- I said I didn't know what to do, because I was not clear on my rights.

Q. Okay.

A. And that my husband knows more about what our rights are, and would he please let me call him, and then he could come there and talk to them.

Q. Did he let you call your husband?

A. No, sir.

Q. Was your phone inside the residence working?

A. Yes, sir.

Q. And was your husband in a place he could be reached?

A. Yes, sir.

Q. Did, in fact, somebody reach him that evening and tell him to come home?

A. Yes, sir.

Q. Who reached him?

A. Nicki Thomas.

Q. Was this after they had searched the residence?

A. Yes, sir.

Q. Now, did he explain to you your rights by the police car, about ----

A. No, Sir, he didn't. He told me I had -- he had probable cause, and I had no more rights, and they didn't need my permission to search.

Q. Okay. Did he talk about a search warrant?

A. No, just that he didn't have one.

Q. Okay. Did he talk about going to get one written up and seeing if the judge would sign it?

A. No, sir.

Q. What did you think was going to happen if you did not allow them to search your residence?

A. I don't know. I don't know.

Q. Okay. Did you have any children inside the house?

A. I had two.

Q. Okay. How much time do you think elapsed from the time he knocked on the door and the time that you were being led back inside after being by the police car?

A. Well, about maybe five, five and a half minutes.

Q. Were you scared?

A. Yes, sir.

Q. What type of education have you gone through, ma'am?

A. I graduated from the twelfth grade. And I tried going to college, but I couldn't pass college English, so I failed.

Q. Okay. Have you ever been arrested before?

A. No, sir.

Q. Have you ever had your car searched before?

A. No, sir.

Q. And we know you never had your house searched.

A. No, sir.

Q. Okay. What do you tell Detective Maney when you were out by the police car about him searching?

A. That I wanted him to wait, let me call my husband, and wait for my husband to arrive.

Q. And what does he do then?

A. Then he turned me around and put the handcuffs on me and said -- that's when he said that he had probable cause and I no longer had any choice whether they searched or not, and led me back into the house by my elbow.

Q. All right. Did he say anything when you got in the house?

A. He told me, he said, are you going to show me around, or what?

And then I said, where did you want to look first?

Q. Okay. And then y'all went to the bedroom?

A. That's when he told me he wanted to go to my bedroom, yes, sir.

Q. Okay. Did he come upon a closed closet in your bedroom?

A. Yes, sir.

Q. What happened when he saw that closet was closed?

A. He opened it and looked inside.

Q. Did you question his authority about going in that closet?

A. Yes, sir. I didn't understand it. Anything I saw on television, that they're not supposed to do any -- open anything and search without a search warrant. But that's all -- and I didn't know if that was in real life, because TV don't usually portray ----

Q. Was it a real-life TV drama,or just a movie?

A. Just a movie.

Q. Okay. And he responded to you how?

A. He said, yes, I can.

Q. And he then opened that closet?

A. Yes.

Q. And he found what?

A. He found a black garbage bag.

Q. Okay. That had marijuana in it?

A. Yes, sir.

MR. RAFOOL: I have no further questions, Judge.

I would pass to Mr. Pickard.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. PICKARD:

Q. Ms. Crall, when the police came to your door to begin with, you said they told you they needed to talk to you; correct?

A. Yes, sir. Yes, sir.

Q. All right. Did they ask you if they could come in?

A. No, sir.

Q. You've saying they were in -- they came in the first time against your will?

A. Yes, sir.

Q. You did not want them in your house?

A. No, sir.

Q. Did you tell them, please do not come in, I do not want you in my house?

A. They were -- whenever I was standing at the door, Maney put his foot in between my two feet and stood up, which caused me to go back. And then he followed me - follow it up with more steps, and I was in the house and they were in the house.

Q. So they basically forced their way in against your will?

A. Yes, sir.

Q. Okay. After they got inside, they told you why they were there?

A. Yes, sir.

Q. You said they told you that someone had said they had smelled smoke coming from your house, and they wanted to search your house?

A. Yes, sir.

Q. Did the officers tell you that they had received information that marijuana was being sold from the house?

A. No, sir.

Q. They never mentioned anything to you about any marijuana?

A. No, sir. Just that they smelled funny smoke coming

from my house.

Q. Okay. But the word "marijuana" was not brought up at all?

A. No, sir.

Q. And when they said they wanted to search your house because they felt they smelled funny smoke, you said no?

A. Yes, sir.

Q. All right. Why?

A. Because my husband was not there.

Q. Okay. Did you feel that you did not have the right to say yes or no without your husband being there?

A. I usually make sure that on -- this seemed to be an important decision, and I usually don't make decisions, important decisions, without my husband. I felt that he should be there.

Q. Even though at that time the police had said nothing about drugs or marijuana, all they had something about was smoke, you still felt you did not want them searching your house?

A. They wanted to search for -- after I had been - the stem was found, then they wanted to search with -- for marijuana.

Q. Okay. Let's talk about the stem. Did you see them find the stem?

A. No, sir. I saw him turn on the flashlight. He knelt down. I did not see him pick up anything. I did not see his hand go completely to the floor.

Q. Is it your feeling that they made up this stem being there, that the stem never existed, and they are simply lying about that? Is that your feeling?

A. I believe that they had it with them, yes, sir.

Q. Okay. That they had it and sort of planted it or claimed they found it on your floor, when they really didn't?

A. Yes, sir, because I just got finished cleaning my house.

Q. Okay. And it's your feeling that that stem -- or that there was no marijuana stem there on the floor?

A. Yes, sir.

Q. Okay. You were taken outside. You were placed under arrest. Do you recall asking the officer something along the lines of what do we do now, or what's going to happen next? And he says, well, we can go get a search warrant?

A. No, sir.

Q. Okay. You don't recall any conversation at all outside with Detective Maney where the word "search warrant" was mentioned?

A. The only thing I can remember about them is when they said they didn't have a search warrant.

Q. Okay.

A. And they needed my permission to search.

Q. And you what?

A. They needed -- they wanted my permission to search.

Q. All right. Detective Maney has said that after he told you that they could get a search warrant, you said, okay, you can go ahead and search. Your testimony is that is not true; correct?

A. Yes, sir.

Q. Okay. You never at any time gave them permission to search your house?

A. No, sir.

MR. PICKARD: That's all.

THE COURT: Okay. Redirect?

MR. RAFOOL: One question, Mrs. Crall.

REDIRECT EXAMINATION

BY MR. RAFOOL:

Q. Were you crying when you were outside with Detective Maney?

A. I was very nervous, and I was very scared. I was

very confused.

MR. RAFOOL: Okay. No further questions, Judge.

THE COURT: Thank you, ma'am.

MR. RAFOOL: Judge, we would call Nicki Thomas to the stand. She's outside.

NICKI THOMAS

having been produced as a witness on behalf of the defense and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAFOOL:

Q. Ms. Thomas, my name is Brandon Rafool. I'm going to be asking you some questions about an incident that happened February 28th, 1997.

Q. What is your name?

A. I'm Nicki Sue Thomas.

THE COURT: Speak a little louder, ma'am.

A. Nicki Sue Thomas.

Q. Okay. Were you present at 1003 Meadow Avenue in Lakeland, Florida, February 28, 1997, at approximately 9:30 to 10:00 in the evening?

A. Yes, I was.

Q. What happened that evening when you were there?

A. There was a knock at the door, and Julia went to the door. And when she opened the door, two police officers were standing there. They had the screen door open, going towards to come in, and they asked her if they could ask her a few questions. By this time, they were in the house. And Julia was standing to their left, and said, I prefer if you would wait until my husband got home.

And at that time, they had already had their flashlight out. The gentleman standing behind the police officer that was in front of him, and had said that he had found something, and that he needed to go outside and find a test tube to test it to find out what it was.

Q. Let's go back to the door. When they were at the door, did Mrs. Crall allow them in the house?

A. No. They had already had the screen door open, coming in, when they -- they had told her their names as they were coming in, and wanting to ask questions.

Q. Okay. Is there a doorbell at the 1003 Meadow house?

A. Yes, there is.

Q. And did it work in February of 1997?

A. It works, but it's -- it's not a real clear bell.

Q. Okay. But the doorbell is outside the screen door; correct?

A. Yes, it was.

Q. So you could ring it without opening the screen door?

A. Yes.

Q. And if somebody would have rang it, you would have heard it, sitting ten feet from the door?

A. Yes, you can hear.

Q. Now, did you advise Ms. Crall that never anything -- that she did not have to allow them to search?

A. Yes, I did.

Q. And what was either officers' response?

A. They -- well, first, they insisted, to want to talk to her. And she -- she said, I prefer that you wait until my husband comes home, and she repeatedly said this several times to them.

Q. Okay. And she told them that: they could not search, she wanted to wait for her husband; correct?

A. Yes, that's correct.

Q. What did they do then after they found the marijuana stems?

A. They took her outside.

Q. Okay.

A. After they told her that she was under arrest.

Q. Okay. And how long were they outside for?

A. Not very long. About a minute, at the most.

Q. Okay. Did you happen to see where they went outside?

A. No, I didn't.

Q. Okay. What happened next?

A. They came back inside. And at that point, Julie said, where do you want to start? And they were already going to the bedroom in the house. Julia was going to go to her office, and they went to her bedroom instead.

Q. Where were you -- let me strike that.

Did they allow you or did you ask to go outside with her?

A. No, they made me sit on the couch.

Q. Did they tell you to sit on the couch?

A. Yes, they did.

Q. And did you ever make any attempt to try and ----

A. I stood up, and they told me I needed to sit back down.

Q. Who said that?

A. I'm not sure, because the police officers -- I'm not familiar with their names.

Q. Okay. Did you see the two officers that came out of the courtroom earlier?

A. Yes, I did.

Q. Do you recall, was it the first officer that came out or the second officer, or if you don't recall ----

A. I don't recall. I got them mixed up.

Q. Now, when Julia came back inside, she was handcuffed?

A. She had her hands behind her back. They weren't actual handcuffs, I don't believe. I don't believe them being handcuffs.

Q. But they were tied together?

A. Yeah, I think straps or -- they weren't handcuffs.

MR. RAFOOL: I don't have any further questions. I pass.

CROSS-EXAMINATION

BY MR. PICKARD:

Q. Ms. Thomas, what relation are you to Ms. Crall, or why were you over at her house that day to begin with?

A. I have been a friend for nine years.

Q. Were you just visiting over there?

A. Yes, I was.

Q. Also, the police -- and we're going to get into that a little later today - arrested a man who drove up to the house named Robert Thomas. Are you related to him?

A. Yes, I am.

Q. What relation are you to him?

A. He is my brother.

Q. Okay. You say when Ms. Crall, back in the house, she said to them, where do you want to start, and that's when they began doing their search?

A. That's correct.

MR. PICKARD: That's all.

THE COURT: Redirect?

MR. RAFOOL: No redirect.

I just would like to call one last witness.

THE COURT: All right, sir.

(Witness excused.)

ALAN KEITH CRALL

having been produced as a witness in his own behalf an having

been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAFOOL:

Q. Mr. Crall, please state your name for the record.

A. Alan Keith Crall.

Q. Okay. Do you reside at 1003 Meadow Avenue in Lakeland, Florida?

A. I do.

Q. And did you reside there February 28th, 1997?

A. I did.

Q. Did you give officers permission to search your residence that evening?

A. I did not.

MR. RAFOOL: No further questions, Your Honor.

MR. PICKARD: No questions.

THE COURT: Thank you.

Argument, gentlemen?

MR. PICKARD: Do you want me to go first? Do you prefer that?

THE COURT: As you wish, gentlemen.

MR. PICKARD: Judge, first of all, I guess the implication is being made that what the police did in this case, they had no right to do. That is, go up to someone's house, knock on the door, ask them for permission to talk and to consent. In fact, they do have the right to do that. There is no -- there is no lawful -- or there is no legal authority that says you even have to have suspicion to talk to anybody, to walk up to anybody and talk to them and ask them for permission to search. So there is nothing illegal about what the police officers did.

Secondly, you do not have to knock and announce. Knock and announce applies to search warrant situations and arrest situations. It does not apply to situations like this.

When the police found the marijuana on the floor, they had the right at that time to investigate where it came from, who it came from, and the circumstances of it being in the house. Unless, of course, the court wants to accept the testimony of Mrs. Crall, that they forced their way in to begin with, and were not in a position -- because if they were rightfully in the house, they were in a position to see this marijuana stem in plain view, which gave them the right to do a further investigation of the circumstances surrounding whose it was and how it got there. Unless the court wants to accept, as I said, Ms. Crall's testimony that they had no right to be there to begin with because they forced their way in the house against her permission or consent.

There is no requirement that people sign consent-to-search forms. There is no requirement that the police tell people they have a right to refuse to consent to searches. And the case law is -- is clear on that. There are numerous cases an that.

There is nothing that these officers -- in going back and listening to the testimony, I can find nothing in this case that the officers told to this lady that was not the truth. They told

her they wanted to talk to her. Once they got inside, they told her we're here investigating a claim of marijuana being sold from your house. After they went outside, when she asked them, well, what's going to happen next, they said, well, we're going to get a search warrant or we can get a search warrant . That's the truth.

And then she -- if that causes her to say, okay, you can search, that does not make the -- make the consent involuntary, because they have done nothing improper or wrong or lied to her about anything. They were simply answering her question. They said, well, we're going to get a search warrant. And then she says, okay, you can search. That, in and of itself, does not make her consent involuntary or not freely given.

The other point I would bring out is that in this case, once the marijuana was found on the floor -- unless, of course, the court again wants to accept Mrs. Crall's testimony, that she feels the police didn't find it there, and that they had it with them all along or that they planted it -- once that marijuana stem is found on the floor inside the home, they certainly had a right to get a search warrant. It had been done many times in the past, according to Detective Maney. So at that point, even if she had said, no, you cannot go in the house and search the house, they would have simply gone and gotten a search warrant, and this stuff in the closet was going to be found, anyway.

I don't know of any judge in this circuit that, under these facts, is going to say, no, I'm not going to sign a search warrant. if a police officer comes to them and says we were inside the residence, the front door, found a marijuana stem on the floor, the resident will not allow us to consent -- a consent to search - will you put that in a search warrant, that based on their experience, it was marijuana, it tested positive for marijuana, I think any judge in this circuit is going to sign a search warrant.

So this marijuana in the closet was going to be found, one way or the other. Whether it was found pursuant to a consent search or whether it was found pursuant to them getting a search warrant and finding it two hours later when they came back with a search warrant, it was going to be found. I guess what we're talking about here is inevitable discovery, because it was going -- as I said, it was going to be found, anyway. So I think under either of those theories, the motion to suppress the marijuana that was in the closet should be denied.

MR. RAFOOL: May it please the court?

THE COURT: You may, Counselor.

MR. RAFOOL: Judge, I've got a stack of cases that I'll refer to in order.

First, I'll give a stack to Mr. Pickard, then I'll give a stack to you, Your Honor. I'll just briefly highlight them, and you can go back and read them later, Judge.

Mr. Pickard, I guess, is justifying this search on inevitable discovery. But from the testimony that I've gathered, it's seems like it's relied upon by consent. But, Judge, we have four specific problems with the entrance into the house and the seizure and the other drugs listed in the state's response to discovery, which we're seeking to suppress. I'll take them in order.

First, Judge, the police violated the Knock-and-Announce Statute. And I'll have -- I cite to the court Benefield versus State, 160 So.2d 706. It's a Florida Supreme Court decision in 1964. That case, Judge, is a sentinel case on knock and announce. And I want to show the court Page 3 ----

THE COURT: I'm sorry, Counselor. Which case are

you referring to now?

MR. RAFOOL: Benefield versus State, Your Honor. And I want to just basically -- everybody is familiar with the facts of that case; I'm not going to read them into the record.

But on Page 3, Judge, the pertinent facts are, two arresting officers made no announcement of their authority and purpose before entering petitioner's home, and did not tell anybody why they were in the house until they had actually pushed their way through the door. And there's some very nice language about what our Fourth Amendment is. And our Fourth Amendment, Judge, as we all know it, protects us all from unreasonable searches and seizures, especially in our home, which is described by every court in this nation and every court in this -in the United States, as our castle. And a person should have the right to be free from unreasonable searches and seizures in their castle. That's the only place in the United States a person has these strong rights.

And on Page 4, Judge, I cite Paragraph 8. I cite from the Benefield case that they state: Entering one's home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. William Pitt has categorized a man's home as his castle.

At the top of Page 4, the right-hand column, it's cited: The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There's nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their own home by a police officer decorated with guns and the insignia of his office. This is why the law protects the interest so rigorously.

Judge, these officers testified they were only there to search for narcotics. They were sent there by their fellow officers to search for narcotics. Badges, guns, sheriff's

department logo, sheriff's department vehicle. They did not tell Ms. Crall this through the screen door, which they could have. They did not tell this to her at the threshold, which they could have. They pushed their way in, by Mrs. Crall's testimony. Or if you would choose to go with the officers' testimony, they still were inside prior to them telling their purpose.

And I take argument, and I would like the court to agree with me, that the state saying that knock and announce only applies to arrest warrants, is basically saying the Fourth Amendment only applies when you go in to arrest somebody. The Fourth Amendment applies to protection.

And, Judge, we feel that by not stating at the door that they were there to search for marijuana, they violated the Benefield case, and the Knock-and-Announce Statute.

Judge, the case of State versus Bamber, which is the next one down, basically recites and restates Benefield. This is a 1994 Florida Supreme Court case. And they quote in there the language of Benefield. And, Judge, I want to note that in the Bamber case, the police officers had a warrant and chose not to knock. And the Florida Supreme Court said, Judge, that there was no exigent circumstances for a no-knock warrant.

Why is it that the Polk County Sheriff's Department is taking it upon itself to train its officers, and training younger officers to do knock-and-talks, and take away from you, as a judge, the right to issue search warrants? You are the neutral and detached magistrate that should make that decision, Your Honor. And by doing this, they have usurped your authority. And, therefore, we feel that's unconstitutional, and the evidence should be seized - should be suppressed.

And, Judge, turning to my second argument, is that the consent was not freely and voluntarily given: The facts to support is that when they first went inside the residence, there's been testimony by Ms. Crall and Ms. Thomas that they pushed their way in. They didn't give her a chance to tell them no, or

shut the door in their face. Their foot was in the door; they pushed their way in. That's not freely and voluntarily allowing somebody in your residence.

When they were in the residence, she specifically told them, no, you cannot search, and let me speak with my husband. They did not take that as a no. I'm going to address that in my third point.

But, Judge, they then took her outside from her friend, and allegedly obtained this consent, where they had consent forms in the truck -- or in the car, didn't use them, didn't tell her she had a right to an attorney, didn't tell her she had a right to refuse, didn't tell her anything. And it's clear from Officer Maney's testimony that she was confused. She specifically asked him, what can we do now.

And you heard him testify about how he's versed in federal law and state case law. And he did not even explain to her, you have a right to say no to this search; you have a Fourth Amendment Constitutional right. He didn't do it. He let her misconception grow to gain consent; the whole reason he's there.

Judge, Bumper versus North Carolina, a United States Supreme Court case, which I'm just going to cite for the prosecution -- it's not in your pamphlet. But it says: The prosecutor has the burden by preponderance of the evidence to prove consent was freely and voluntarily given.

Had Ms. Crall said yes when they first came in, that's free and voluntary consent. But allowing them to take her outside after she says no, and coercing her and taking her from her friend, in handcuffs, while her children are inside that residence, is not free and voluntary consent.

And for a case on point, Judge, I'm citing Talavera versus State, 186 So.2d 811, and it's a Florida Second District Court of Appeal decision. And, Judge, in that case, an individual -- there was -- they wanted to serve a warrant -- I'm sorry. They wanted to arrest an individual, so they went to his house

and knocked and asked if they could look around. And the individual, Mr. Talavera said, yes, because he figured he didn't have any other choice because he could have done it, anyways. These are direct quotes on Page 2.

And just as in our case, they never told him he had a right to an attorney. They never told him he had a right not to consent. They never told him he had a right to refuse. And they, in that case, said that his submission to this authority is not voluntary consent. And that's on Page 3. They say: The mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather, for an occupant to waive his rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search, being cognizant of his right in the premises. She was not cognizant of her rights in the premises. That's clearly shown by Detective Maney's testimony that says -- where he says, he alleges that she says, what can we do now? But yet he takes it upon himself to do this search. He doesn't take it upon himself to write up a warrant and bring it down here for you or another Judge to sign it, which there's many circuit judges that are out there. So, Judge, I submit to you that this consent is not freely and voluntarily given.

Now, my third point, Judge, is back on the consent, it goes to when she says no. I don't think -- and there's case law that I'll cite in a minute about the Knock and Talk Doctrine -- that a person has a right -- excuse me, a police officer has a right to enter a threshold of a person's residence simply to gain consent to search. I think the case law out there says that you have a right to stand on the doorstep in a public place, which is a doorstep, where any bill collector or anybody else can stand, and ask for consent. To gain consent into a residence by saying let me come inside and talk to you for a minute about something is an ambiguous statement when the officers specifically know why they're there.

So, therefore, Judge when she is inside and finds out by

them that they want to search her residence and she says, no -- every witness that testified here today said that she says, no, you can not do that, let me wait for my husband to get here. At that point in time, any purported authority that -- you know, Mr. Pickard and I disagree on whether they had a right to be on the threshold. But even if you agree with his side, what they were doing there stopped, and they had no right to remain.

And I cite for the court Leslie versus State, which I have the WestLaw cite of 96 WL 34 -- excuse me, 324977. It's a Florida Second District Court of Appeal of June, 1996. And the facts of that case was there was a package that they discovered contained some money. The officers planned to go into the residence when the tracking device went off, and either received a consent to search for the package, or go and get a search warrant at 5:30 p.m. Well, here we are at night, Judge, at 9:30 to 10:00 p.m. Five to six officers in the Leslie case approached the trailer, wearing black camouflage gear, and one carried an automatic rifle. The officers in our case, Judge, carried guns, two of them. They wore a badge. And they were there at approximately 9:30, 10:00 in the evening.

Ms. Leslie refused to consent to search the residence, and the officer on the scene ordered everyone out of the trailer, including Ms. Leslie and them. They went outside, Your Honor. And then Mrs. Leslie consented. And she took -- and she testified at a hearing that she consented because she had a migraine headache and was concerned for her family. And the officers told her it would take two to three hours to get a search warrant.

The Second DCA, on Page 2, Columns 1 and 2 -- excuse me, Paragraphs 1 and 2, ruled: Assuming that they had an initial right to enter onto the property for the purpose of seeking Leslie's cooperation -- assuming they had right to be there -- their authority to remain terminated when she refused.

Okay. Judge, it stopped right then and there. When she

said no, they had no further authority. They should have left and gone outside and done what they thought they should have done.

The last issue I have, Judge, is the knock and talk, which I disagree with Mr. Pickard explicitly about there being cases out there that allow them to do this.

The first case I cite which is in your package is Johnson versus United States, which is a United States Supreme Court decision, 68 S.Ct. 367, it's a 1948 decision, which is still good law, according to Sheppard's. And, Judge, I specifically cite the facts in that case which are identical to what we have here, and that's on Page 3. A detective, a federal detective or one detective -- excuse me. Excuse me, Judge. A detective with the Seattle Police received information from a confidential informer that they used before -- which is one fact that we don't have anybody they've ever used before. In our case, they just have an anonymous tip. They receive information that someone could smell burning opium in a hallway. They recognize this odor, and it led them to Room 1. The officers knocked on the door, and a voice inside asked who is there? And the reply is, Lieutenant Belland.

There was a slight delay, some shuffling in the room, and the defendant opened the door. The same thing here. The officer in Johnson says, I want to talk to you a little bit. And the lady inside the door stepped back acquiescingly, and admitted the officer. He said I want to talk to you about the opium smell in your room. And then, he said, I want you to consider yourself under arrest, because we're going to search the room.

Judge, the case we have before us, the same thing. He's at the door. He says I want to talk to you about something. He pushes his way past her. Then he tells her I want to search, and she says no. But in the case of Johnson, Your Honor, they state, the United States Supreme Court does, in Paragraph 1: Entry to defendant's living quarters, which is the beginning of

the search -- which I'm claiming here -- was demanded under color of office. It was granted in submission to the authority, rather than as an understanding and intentional waiver of constitutional rights.

Paragraph 3 and 4 states: That the point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw; its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of the crime.

And at the end of that page, Judge, they say: The right of priv -- when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by you, a judicial officer; not Detective Maney and not Detective Macek on the street.

And, therefore, Judge, they held that: An officer gaining access to the private living quarters under color of his office and the law of which he personally advised, must then have some valid basis in law for the intrusion. And that's the only reason they got in this house, is because they had a badge and guns and they said we want to come inside and talk to you. And, Judge, that's not proper under the law.

And in further support of that, Judge, I'll cite State versus Gansz, where a probation officer knocked on the door, and told the probationer I have reason to believe that there's some stuff in your house and I want to search it. Mr. Gansz replied: Sure, man, I'm going to sleep. They searched, found marijuana. The officers then seized it, and arrested him.

And the Fourth District Court of Appeal states: The Fourth Amendment puts a restraint on the arm of government. It prevents it from invading the sanctity of a man's home or private quarters except under safeguards calculated to prevent oppression and abuse.

You, Judge, you're the one that draws search warrants; not

them. And they cite in Paragraph 5 that it's clearly necessary for the officers to obtain a search warrant before conducting their search of the Gansz residence. And it was clearly necessary in our case.

An Inevitable Discovery Doctrine, Judge, does not apply here. And I'm going to cite to that effect, and this is my last case, Your Honor, is Alderton versus State, Florida Second District Court of Appeal, 1983 case, the last in your packet, cited at 438 So.2d 1000. In that case, Judge, they had a confidential informant that had sold them marijuana. They had turned him-and asked him to take them to the house where he got the marijuana from and do a buy. The police -- he took them there and showed it to them. The police knocked on the front door and announced that they were police officers and entered. They asked the appellants to search the house, to cooperate and let them search. They refused, and the officers secured the residence and went to obtain a search warrant.

In Paragraph 1, the Second District Court says initially: We note that the entering and occupancy of the house in this case constituted a Fourth Amendment search and seizure. The same thing we have here. And absent exigent circumstances, they may clearly not force entry to a home without a search warrant simply because they think they have probable cause to believe evidence of a crime may be found therein.

And, Judge, in this case, they went and got a search warrant based upon the evidence, and it was still ruled to be an unreasonable search and seizure because they crossed the threshold without a warrant, and improperly.

So, therefore, Judge, the four points I would like the court to consider is, first off: There's no knock-and-announce compliance. That's grounds in and of itself to dismiss this search and to rule in favor of the defendant.

Secondly, the state has not proven by a preponderance of the evidence their burden that any purported consent was freely and voluntarily given.

Thirdly, Judge, when she told them no, no means no in this state. A woman tells you no, and you go further with her, you'll be charged with a sexual battery. If a person in a house tells you no, it means no. And that means you're not to do anything further, you're to stop.

And, Judge, the last thing is, the knock-and-talk based on the Johnson versus U.S. case is not proper in this instance here.

Therefore, Judge we would ask that you grant our motion to suppress with regard to Mr. Crall.

Thank you.

MR. PICKARD: Can I be heard real briefly, Your Honor?

THE COURT: Sure.

MR. PICKARD: Your Honor, the cases that were cited here involving knock and announce are cases involving where police go to someone's house to serve a search warrant or they are there to arrest them; not situations like we have here. And even the statute itself talks in terms of -- which is Florida Statute 901.19, an officer, in order to make an arrest, either by virtue of warrant or when authorized to make an arrest for a felony without a warrant, may break open a door or window, et cetera, et cetera.

Knock and announce does not apply in this case. Otherwise, are you saying any time a police officer goes to somebody's house for whatever purpose -- and police officers have contact with people for a lot of purposes other than serving search warrants and making arrests. They go interview them because they're witnesses and -- witnesses to crimes. They notify them about recovered property, or their car that's been stolen has been located. I mean, are we saying every time they walk up to somebody's door and knock on it for

whatever purpose, they have to stand outside and say we are so-and-so, we are here for this particular purpose, will you please let us in. There is no requirement of knock and announce except for serving search warrants and arrest warrants. And that's not why they were there.

As far as the consent to search being -- in this case, from Ms. Crall being invalid, I think Mrs. Crall's credibility has a lot to be desired here. You have to look at this woman's believability or credibility. First of all, she says they forced their way in to begin, which they deny. Secondly, she says they told her nothing inside about any marijuana that they were there for -- because they received information about marijuana. She says they told them they received information about smoke coming from house. Thirdly, she says there wasn't any marijuana there to begin with, and thinks that they either brought it with them or planted it.

And, secondly, she denies she even consented. Here, she doesn't say -- and I think this is important. She does not say to the court, they forced me to consent or this was an involuntary consent. She says I never consented to begin with. I never at any time told them they could search the house.

Thirdly, the argument has been made, well, when she says no the first time, they can't search, their obligation is to turn around and walk out and leave. Well, that may be so, except for the fact that that was the point in time when they found the marijuana down on the floor. And at that point, when they found the marijuana on the floor, they did not have to immediately turn and walk out and leave. They had a right to do further investigation concerning why that marijuana is there, whose is it was, and how it got there. So they are not required at that point, based on what they saw in plain view, to turn around and just ignore it, which apparently is what the argument is being made to you, that as soon as she said no, you can't search, that their obligation is to just ignore what they saw on the floor and just walk out of the house. And I

don't know of any police officer that's going to -- that's going to do that.

That's all, Your Honor.

THE COURT: Okay. Thank you, gentlemen.

MR. PICKARD: Oh, there is one case I wanted to give you, was dealing with whether the police can, in fact, just walk up to someone and ask for permission to talk to them and permission to search without having any sort of suspicion or probable cause. And this is the U.S. Supreme Court case of Florida versus Bostick, 1991. This arose out of the situation in Fort Lauderdale where police officers would randomly board buses in bus stations and just walk through the aisles of the bus asking passengers can we search your luggage, for no reason, no suspicion, nothing about any particular person that would warrant any belief that they had anything illegal. They were just randomly picking out passengers.

And the Florida Supreme Court, back in '89 or '90, says that practice is illegal. You can't just simply walk through buses and randomly pick out people for no reason and ask them if you can search their luggage. And the U.S. Supreme Court reversed and said as long as the consent is freely and voluntarily given, the police don't have to have any reasonable suspicion, probable cause, or anything else.

And I would give the court that case, which is the case that I think the officers are relying upon when they say that they --

You've already got that?

-- that they can -- that they do not have to have any sort of reasonable suspicion or probable cause to walk up to someone or to knock on someone's door and ask them if they

could consent. The people are free to say no. And if they have no reason to get a search warrant or if there's no voluntary consent, then the police have to leave.

MR. RAFOOL: Judge, I'm not going to talk in real detail about State versus Bostick. I did anticipate the state bringing this argument up. I would point the court out to right under Justice O'Connorrs opinion on 501 U.S. 431, the United States Supreme Court specifically held that we have -- the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places. And I'll stop reading right there, because that case applies to public places and not a private residence, which is a man's castle in our state and in the United States as a whole.

THE COURT: All right. Gentlemen, I find the knock-and-talk procedure is a valuable device, no doubt, but it is subject to -- patently subject to being misused and to circumvent the requirements of a warrant.

To digress in passing, that here the officer had both a recorder, as well as a consent-to-search form, but he elected to use neither, and then has the temerity to stand before the court and says just forget all that garbage, that's unnecessary because I said to take my word for it, quite candidly, I find the testimony of both the officers lacking in credibility. Their testimony and their demeanor just absolutely destroys them as far as credibility is concerned.

I find the entire process to be a ploy that's not only morally offensive, but also constitutionally offensive.

With respect to the knock and announce, my God, even with a warrant, you're required to knock and announce. Certainly without a warrant, then you're required to do no less. I find such acts to be abhorrent. It violates every principle in which this country is founded, and I'm going to grant the motion to suppress.

MR. RAFOOL: Thank you.

(There was a brief recess and the hearing reconvened with the same appearances.)

MR. PICKARD: I think that you are capable of being objective in considering this other case with the same officers, then I certainly have no problem with it.

THE COURT: I have no problem with that, Hardy. I'll lay the cards on the table and let them fall the way I see them.

MR. PICKARD: That's all I can ask.

MR. RAFOOL: Judge, we'll proceed on Thomas. He's outside.

MR. PICKARD: We would call Detective Maney again.

Your Honor, this will be sort of picking up where we left off in the last case.

J.D. MANEY

having been produced as a witness on behalf of the state and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PICKARD:

Q. Detective Maney, at some point, did a Mr. Robert Thomas arrive at the Crall residence?

A. Yes.

Q. All right. What was going on there at the point where he arrived?

A. The narcotics detectives were all there, already there working the case. And I was sitting in my car and -- when he drove up.

Q. Okay. Had the marijuana inside been found?

A. Yes.

Q. Okay. Had Mr. Alan Crall arrived at the house and been arrested at the time Mr. Thomas showed up?

A. I believe so.

Q. Okay. How did Mr. Thomas get to the house?

A. He drove up in a white Ford Tempo.

Q. Was he by himself?

A. Is this who?

Q. I'm sorry. Robert Thomas.

A. Yes.

Q. Okay. You said he drove up in a white Ford Tempo?

A. Yes.

Q. By himself?

A. Yes.

Q. Tell us what contact you had with him or what he did after he drove up.

A. He pulled up to my left, and he got out and walked around toward the rear. And I got out and walked to the rear and met him, and asked him his name, if he had a driver's license.

Q. Why did you do that?

A. To see who he was.

Q. Okay. He was actually in the driveway of a residence of where you had made some arrests for narcotics offenses or arrests had been made by you or other officers; correct?

A. Yes.

Q. So you did not know who he was; correct?

A. Correct.

Q. Had you asked him to get out of the car, or had he gotten out before you approached him?

A. No. He hadn't done anything wrong, so I couldn't demand his license. That's why I asked.

Q. He was already out of the car?

A. Yes.

Q. You asked him what? Who he was?

A. Yes, and if he had a driver's license.

Q. All right. What response did you get?

A. He found them and handed them to me.

Q. Did he have a driver's license?

A. Yes.

Q. What did you do?

A. I ran him, which would show his license, if he has any warrants.

Q. Was there a warrant?

A. Yes.

Q. Was he arrested based on the outstanding warrant?

A. It was confirmed and, yes, he was arrested for it.

Q. All right. Was his car then searched?

A. Yes.

Q. What was found in the car?

A. As soon as I opened the driver's door, down on the bottom -- on some doors that you have that pocket, and there was a baggie with some kind of white residue. And in the glove box was a Marlboro box with, I believe it was three -- three small bags of white substance. And all -- this was all taken by Detective Murphy.

Q. You were the one who opened the door and found it?

A. Yes.

Q. Okay. From the time that he got out of his vehicle until the point where you searched the car, how much time are we talking about having passed?

A. I would say within five minutes.

MR. PICKARD: Okay. That's all.

THE COURT: All right.

MR. RAFOOL: Briefly, Your Honor.

CROSS-EXAMINATION.

BY MR. RAFOOL:

Q. Now, Detective, you never searched or looked in the vehicle prior to Mr. Thomas handing you his license?

A. Correct.

Q. And when he handed you his license, he had already exited the vehicle, shut the door, and walked around to the rear passenger side of the vehicle?

A. Right near the trunk passenger side, yes.

Q. Okay. So he wasn't on the driver's side of the rear of the vehicle?

A. No.

Q. Okay. And you had no idea of any narcotics being in the vehicle prior to your opening the door and searching it; correct?

A. Correct.

Q. And there was no consent by him to search the car, was there?

A. No.

Q. Why did you search the vehicle?

A. Searching it incident to arrest.

Q. And that's your sole reason, sir?

A. Yes.

Q. And the marijuana was found in the driver's door compartment?

A. It was methamphetamine.

Q. Okay.

THE COURT: I'm sorry. I couldn't hear you.

THE WITNESS: Methamphetamine.

Q. (By Mr. Rafool) Now, let me ask you this: When the warrant came back, you were standing outside the rear of the vehicle with Mr. Thomas?

A. When it showed the hit, yes.

Q. Right. When it showed the hit.

A. Yes.

Q. Then you took Mr. Thomas inside in handcuffs; correct?

A. I believe so.

Q. And placed him in the living room of the Crall residence?

A. I don't know where they put him.

Q. Okay. But you took him inside the residence?

A. Correct.

Q. And then you went back outside the residence?

A. When the warrant was confirmed, yes.

Q. But you had already dropped Mr. Thomas off inside the residence in handcuffs?

A. Correct.

Q. And then you went back outside the residence?

A. I believe so.

Q. And you searched the car?

A. Yes.

Q. So he was nowhere near the outside of the car when you did the search?

A. I don't believe so.

Q. And how much is the distance between the house and the car?

A. I have no idea.

Q. Greater than 20 feet?

A. Maybe.

Q. And this car was not impounded prior to you doing this search, was it?

A. No.

MR. RAFOOL: No further questions, Judge.

MR. PICKARD: No other questions, and no other witnesses.

THE COURT: All right.

MR. RAFOOL: Judge, I would just like to call my client.

THE COURT: Very well.

ROBERT ALLEN THOMAS

having been produced as a witness in his own behalf and

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAFOOL:

Q. Mr. Thomas, please state your name for the record.

A. Robert Allen Thomas.

Q. Did the officers tell you on February 28th, 1997, that they had a search warrant for either the residence at 1003 Meadow Avenue or either your car?

A. No, sir.

Q. Did you ever see a search warrant?

A. No, sir.

Q. And was -- were you driving a vehicle on that day?

A. Yes, sir.

Q. What kind of car was it?

A. '84 Tempo.

Q. Okay. Did you consent to any searches of that vehicle?

A. No, sir. It wasn't mine.

Q. Is that a vehicle you customarily drive?

A. No, sir.

Q. Had you received permission to drive it?

A. Yes, sir.

MR. RAFOOL: No further questions, Judge.

MR. PICKARD: No questions.

MR. RAFOOL: Sit down, Mr. Thomas.

THE COURT: Gentlemen, what have you got? Who's going to argue first?

MR. PICKARD: I can.

Your Honor, I don't think this is a case where credibility of the witnesses really has that much to do with it. I think it's a legal question. I don't think there's too much dispute as to what happened.

The question, I guess, is, are the -- when they arrest a person who had recently been in an automobile and he gets out and they arrest him, do they have the right to search the car, which is really a legal question. And there are some cases that I would give to the court which basically indicate that the police do have the right to search the car under the Belton Doctrine, which is the search of a car incident to the arrest of an individual in it.

In Belton, the police had stopped a car for some traffic violation, and there were three or four males in the car. And I think they arrested the driver for some traffic violation or something, and then searched the entire car, and found something, as I recall, in a jacket in the backseat or something.

And the question arose is, if you arrest a driver of a car

for a traffic violation, can you search the entire car? And the U.S. Supreme Court says, yes, you can. That has since been extended to if you arrest anyone in the car. It doesn't even have to be the driver, although in this case, Mr. Thomas was the driver. You can search the car.

And it has been extended by Florida cases to if the person has recently been an occupant of the car and he gets out, then you arrest him when he's out of the car, the theory that you cannot -- a person cannot get around the Belton rule simply by getting out of the car before the police are able to arrest you.

And the case -- and I'm not going to go through all the factual situations. I will simply give them to the court. State versus McClain, 490 So.2d 1308 would be one. State versus Smith, at 662 So.2d 725. And the most recent one I could find is State versus Jeremiah Johnson. I only have the Florida Weekly cite at 22 Florida Law Weekly Page D1392, June 6 of 1997.

Let's see. Basically, Your Honor, the state's position is, when -- when they arrested him on the warrant, that gave them the right to search the vehicle that he had recently exited from.

THE COURT: All right. Brandon, what have you?

MR. RAFOOL: Judge, I'm only going to cite one case to the court, then I'm going to give you a copy of that.

Your Honor, State versus Howard, which I just Shepardized on the 16th of June, so it's still good case law. It's a one-page case, Judge, and the facts speak for themselves.

Basically, the individual, Howard, pulls up at a convenience store, got out of his car with the pouch in his hand, saw the officer, put the pouch back in his car. The officer knew this individual previously, and knew he had an outstanding warrant, verified it, and then arrested him.

The trial court ruled that the search of the appellant's

vehicle is not a search incident to, because the appellee had exited his vehicle. And until it was a validity -- outstanding arrest warrant was validated -- and then the last sentence, Judge, of the first page, they said the officers did not have a probable cause for the warrantless search of the car as an incident to his valid arrest.

We think that's significant in this case, Judge, because, as the testimony from the officer shows, that Mr. Thomas exited the vehicle, shut the door, walked around to the back, which is totally opposite from the driver's side door and several feet away from the rear of the driver's side of the car, he is then arrested for this outstanding warrant, taken inside the house some 20 feet away, or however big this difference is, and placed inside the house. Then the officer goes back and searches the vehicle.

I think the state's argument would be better taken had the officer arrested him, stood him there, and searched, right then and there. But, again, I still don't think that's enough under the State versus Howard, which cites to the Belton case.

THE COURT: Thank you.

MR. RAFOOL: Suppression should be granted on the Howard, State versus Howard basis.

Thank you, Your Honor.

THE COURT: Y'all have covered me up with some laws, I want to read before I rule on this one. It seems we have two totally different and irreconcilable positions on this. I'm going to see if I can reconcile them. If not, I guess the Appellate Court is going to have to.

Thank you, gentlemen. I'll get you a ruling as quick as possible.

MR. RAFOOL: Judge, do I need to have my clients here for stats if I have them here tomorrow -- if I continue them?

MR. PICKARD: Tomorrow is pretrial.

THE COURT: I'm not sure. It's unlikely I can rule, so I'm not sure.

MR. RAFOOL: I don't think we have a speedy trial problem.

THE COURT: Do you want to continue it one cycle, give you a chance -- do you have any problem with that?

MR. PICKARD: I don't know that it would be a problem, no, sir.

THE COURT: All right.

MR. RAFOOL: Thank you, Your Honor.

THE COURT: If it would facilitate things, there's no way you can get a meaningful ruling on this case by tomorrow, so I will continue the pretrial for one cycle and take it from there. All right.

(Hearing concluded at 4:29 p.m.)

STATE OF FLORIDA

COUNTY OF POLK

I, Linda A. McGill, Registered Professional Reporter and Notary Public duly qualified in and for the State of Florida, do hereby certify that I stenographically reported the foregoing hearing and that the transcript, consisting of Pages 1 through 109 is a true record of the proceedings.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this hearing was taken; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

Dated this 19th day of September, 1997.

_____

LINDA A. McGILL, RPR

The original of this transcript was ordered by Hardy Pickard, Esquire and furnished to the Clerk of the Court.

THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

VS. CASE NO. CF97-01296C

ROBERT THOMAS,

Defendant.

ORDER GRANTING MOTION TO SUPPRESS

This cause came before the Court on Defendant's Motion to Suppress on the 21st day of July, 1997. The Court heard testimony and arguments, and finds:

Facts: Defendant drove his white Ford Tempo onto the premises of a friend, parked it and got out. Detective Maney, who was legitimately on the premises in connection with another matter, intercepted the defendant as he walked away and asked for identification, whereupon defendant produced his driving license. Maney caused a check to be made that resulted in a "hit", as there was an outstanding warrant for defendant. Maney arrested the defendant on that warrant and "as an incident to arrest" searched defendant's car, wherein contraband was found. It is that contraband to which the subject motion is addressed.

Law: From the foregoing facts emerges the question, "Can an officer under these circumstances lawfully search a vehicle, not occupied by defendant, as an incident to arrest?"

The Court must here 'buy in" to the law asserted by the defense as controlling. Judge Cowart, in *State v. Howard*, 538 So.2d 1279 (51 DCA, 1989), said, in essence, that where a

person has exited his vehicle and was then arrested on an outstanding warrant, a search of the car was unlawful. That pronouncement appears "on all fours" here. Indeed, the Court went on to say, "... the officer did not have probable cause for a warrantless search of the car. There was no valid need or reason to search (the) vehicle as an incident to his valid arrest".

It is thereupon

ORDERED that the subject Motion to Suppress is granted.

DONE AND ORDERED at Bartow, Polk County, Florida, this 23 day of July, 1997.

ROBERT E. PYLE, Circuit Judge

Copies furnished to:
Brandon J. Rafool, Esq.
Hardy 0. Pickard, Esq.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA	)	
	)	
Appellant	)	
	)	
v.	)	Case No. 97-03576
	)	
ROBERT A. THOMAS,	)	
	)	
Appellee	)	
_____	)	

Opinion filed May 15, 1998.

Appeal from the Circuit Court
for Polk County;
Robert E. Pyle, Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and Patricia E.
Davenport, Assistant Attorney General,
Tampa, for Appellant.

James Marion Mooreman, Public Defender,
Bartow, and Cynthia J. Dodge,
Assistant Public Defender, Bartow,
for Appellee.

PARKER, Chief Judge.

The State appeals the final order granting Robert A. Thomas's motion to suppress methamphetamine and drug paraphernalia obtained as a result of a search of Thomas's car incident to an arrest on an outstanding warrant. We reverse based upon New York v. Belton, 453 U.S. 454 (1981).

The following evidence was adduced at the hearing on the motion to suppress. Detective Maney was sent to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. Maney knocked on the door, talked to the owners of the residence, and obtained consent to search the residence. Upon arrival, Maney had no intent to make an arrest. After Maney located marijuana inside the residence, the narcotics detectives arrived.

While the detectives were still in the residence, Maney sat outside the residence in his patrol car. Maney observed Thomas drive up to the house, park his car in the driveway, and get out. As Thomas walked toward the rear of the car, Maney got out of his vehicle and met Thomas at the rear of Thomas's car. Maney asked Thomas his name and whether he had a driver's license. Maney made the request because Thomas was in the driveway of a residence where arrests were being made for narcotic offenses. At that time, Maney had no idea that there were narcotics in Thomas's car.

A check of Thomas's driver's license reflected an outstanding warrant. Maney arrested Thomas and took him inside the Crall residence. Maney then went back outside and searched the car incident to Thomas's arrest. As soon as Maney opened the driver's door of the car, he found a baggie with some type of white residue. Maney also found three small bags of a white substance in the glove box. All of the baggies tested positive for methamphetamine. Five minutes elapsed between the time that Thomas exited his car until Maney searched the car.

Following a hearing, the trial court granted the motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). The trial court concluded that where an individual has exited a vehicle and subsequently is arrested on an outstanding warrant, a search of the vehicle is unlawful. We conclude that this finding was error.

The law is well settled that when a law enforcement officer has made a lawful custodial arrest of the occupant of an automobile that an officer may, incident to the arrest, search the passenger compartment of that vehicle. See Belton, 453 U.S. at 460. This court consistently has applied the rule contained in Belton recognizing that a court may not determine on a case-by-case basis whether the interior of an automobile is within the scope of a search incident to an arrest. See Chapas v. State, 404 So. 2d 1102 (Fla. 2d DCA 1981); see also State v. Smith, 662 So. 2d 725 (Fla. 2d DCA 1995).

There does not have to be a nexus between the arrest of the occupant of a vehicle and the subsequent search of that vehicle. Moreover, a defendant does not have to be in the vehicle at the time of the arrest and subsequent search in order for the search to be valid under Belton. See State v. McLendon, 490 So. 2d 1308, 1309 (Fla. 1st DCA 1986) (court will not "distinguish between arrests of persons in the car from arrests of persons recently vacating the car . . . ."). As noted by the court in State v. Johnson, 696 So. 2d 880 (Fla. 5th DCA 1997), the occupant of a vehicle cannot avoid the consequence of the Belton rule merely by stepping outside the automobile as officers approach. The circumstances in this case clearly fall within the Belton rule.

In this case, the trial court relied on Howard, 538 So. 2d 1279. In Howard, the police officer knew that there was an outstanding warrant for the defendant and followed the defendant's vehicle. The defendant stopped at a convenience store and exited his vehicle. At that time, he saw the officer and immediately placed the pouch that he was carrying back

into his vehicle and locked the vehicle. The police officer approached the defendant and placed him under arrest. The officer refused to let the defendant's brother, who had just arrived, take the defendant's car keys. A search of the defendant's vehicle revealed contraband. The Fifth District Court, citing State v. Bennett, 516 So. 2d 964 (Fla. 5th DCA 1987), concluded that the search of the defendant's vehicle was not a search incident to a valid arrest. See Howard, 538 So. 2d at 1280.

The trial court's reliance on Howard is misplaced. In a more recent Fifth District Court decision, State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991), the Fifth District upheld the search of a vehicle incident to an arrest. The defendant was observed driving in an erratic manner. After the defendant stopped and exited the vehicle, he appeared to have difficulty maintaining his balance and exuded the strong smell of alcohol. The defendant was arrested for driving under the influence. When the officer placed him in the patrol car, the defendant's girlfriend accosted the officer. Two or three minutes elapsed before the officer finally was able to search the vehicle at which time he found cannabis. See id. at 1209.

The defendant argued that because he was arrested after he was outside the vehicle, the search was not incident to the arrest. The Fifth District Court disagreed, applying Belton. See id. Furthermore, the court noted that the defendant's reliance on Bennett was misplaced because the court had held in Bennett that an arrest which was a pretext to carrying out a preplanned, warrantless search of a vehicle could not validate the subsequent search. See id.

We can think of few incidents where a driver will not be out of the vehicle when an arrest is made. Therefore, as long as the arrest is not under a preplanned pretext to conduct a warrantless search of the driver, we conclude that the bright line test in Belton applies. Thomas's arrest was not a pretext to carry out a preplanned warrantless search of his vehicle.

The officer did not follow Thomas to the Crall residence because the officer knew of an outstanding warrant for his arrest, nor was Thomas under surveillance which provided the officer with an opportune time to effect his arrest.

Accordingly, the trial court erred in suppressing the evidence obtained during a lawful search incident to an arrest. The order is reversed.

CAMPBELL and QUINCE, JJ., Concur.

Supreme Court of Florida

No. 93,070

ROBERT A. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[October 14, 1999]
REVISED OPINION

HARDING, C.J.

We have for review State v. Thomas, 711 So. 2d 1241 (Fla. 2d DCA 1998), which expressly and directly conflicts with the opinion in State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). We have jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution. For the reasons expressed below, we quash the decision of the Second District Court of Appeal in Thomas.

The facts of Thomas are as follows. On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car.

Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle.

Following a hearing, the trial court granted Thomas's motion to suppress based on State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). The district court reversed, relying on New York v. Belton, 433 U.S. 454 (1981), and held that because the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, the search was lawful because it was incident to the valid arrest of Thomas. See Thomas, 711 So. 2d at 1243.

In Howard, the defendant was followed by a police officer who had knowledge of an outstanding warrant for his arrest for a probation violation. Howard drove into the parking lot of a convenience store, and upon exiting his car with a pouch in his hand, he spotted the officer and placed the pouch back into his car and locked the door. After Howard was arrested on the warrant, he then instructed his brother who was present at the scene not to allow the police to search his car. However, the officer took the keys from Howard's pocket and searched the vehicle and found contraband.

The trial court suppressed the evidence and the district court affirmed. The district court held that the officer did not have probable cause for a warrantless search of the car. The district court stressed that Howard had already exited his car and locked it. The district court stated that even though the officer's suspicions may have justifiably been aroused, there was no legitimate need or reason to search Howard's car as incident to his valid arrest. See Howard, 538 So. 2d at 1280.

The district court in Thomas distinguished Howard based on the fact that the officer in Howard was in reality conducting a preplanned warrantless search, whereas in Thomas the officer did not know Thomas, nor was he aware of the fact that there was an outstanding warrant for his arrest. In reaching its decision, the district court in Thomas relied on Belton's bright-line rule regarding searches incident to arrests: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460 (1981) (footnote omitted). While we do not question the practicality of this bright-line test, nor its application to arrests that are initiated by the conduct of an officer, we believe there must be a distinction drawn when an individual voluntarily exits his car without provocation from law enforcement personnel and without knowledge of their presence.

In Belton, a New York State policeman was passed by another automobile driving at an excessive rate of speed. The officer gave chase, overtook the speeding vehicle, and ordered its driver to pull over to the side of the road and stop. After comparing the vehicle registration to the driver's licenses of the driver and the three passengers, one of whom was Belton, the officer discovered that none of the men owned the car, nor were they related to the owner. In the course of verifying their

identification, the officer smelled marijuana emanating from the vehicle, and also saw an envelope marked "Supergold" on the floor of the car, which he associated with marijuana. The officer then directed the men to get out of the car and placed them under arrest for unlawful possession of marijuana. He opened the envelope, which contained marijuana, searched the passenger compartment, and found cocaine in a pocket of a leather jacket found in the car.

The United States Supreme Court in Belton referred to Chimel v. California, 395 U.S. 752 (1969), for the proposition that a lawful custodial arrest justifies a contemporaneous search of an individual without a search warrant. The Court in Chimel concluded that such searches were necessary to (1) remove any weapons that the arrestee might have and (2) prevent the concealment or destruction of evidence. Relying on this reasoning, the Court in Belton held that when an officer has made a lawful arrest of the occupant of a vehicle, he may search the passenger compartment of that vehicle as long as it is in within the narrow time frame incident to the arrest. The Court did not state that the Chimel factors must be established before the vehicle can be searched; rather, the Court set up a bright-line rule to be applied in all cases. Florida's district courts have consistently applied this bright-line principle to analogous situations. See Shaw v. State, 449 So. 2d 976 (Fla. 1st DCA 1984) (affirming denial of motion to suppress, even though defendant was handcuffed and placed in the officer's vehicle before the search was conducted); Chapas v. State, 404 So. 2d 1102 (Fla. 2d DCA 1981) (upholding Belton search after defendant was ordered out of the car, arrested for driving while intoxicated, and placed in a police vehicle); State v. Valdes, 423 So. 2d 944 (Fla. 3d DCA 1982) (holding the search of vehicle justified as a contemporaneous incident of the lawful arrest of defendant, notwithstanding that defendant was removed from the vehicle and placed in a nearby police cruiser); State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA

1991) (upholding Belton search where defendant was pursued by an officer with siren on and lights flashing, arrested for driving under the influence, and placed in a patrol car, and two to three minutes later the officer searched the vehicle); see also United States v. White, 871 F.2d 41 (6th Cir. 1989) (holding that Belton governs when an arrestee is removed from the car prior to the time of search); United States v. Karlin, 852 F.2d 968, 971-72 (7th Cir. 1988); United States v. Cotton, 751 F.2d 1146, 1149 (10th Cir. 1985); United States v. McCrady, 774 F.2d 868, 871-72 (8th Cir. 1985).

However, when searches occur beyond the scope of Belton's bright-line intent, the factors in Chimel of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful. The Supreme Court addressed the parameters of Belton's application in Knowles v. Iowa, 525 U. S. 113 (1998). In Knowles, the defendant was only issued a traffic citation, and was not placed under arrest. Chief Justice Rehnquist, writing for the Court, held that a full search of an automobile pursuant to issuance of a citation for speeding violated the Fourth Amendment. The Court declared:

> Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for the destruction or loss of evidence is not present at all. We decline to do so.

Id. at 118-19. Not finding the circumstances to be analogous to the circumstances that were the foundation to the Belton decision, the Court declined to apply the bright-line test. Id.

In examining the application and limitations of Belton, we believe the Second District Court of Appeal in Chapas was correct in interpreting Belton as "establishing a rule applicable

to all cases involving the arrest of a recent occupant of an automobile." See Chapas, 404 So. 2d at 1104. However, the court in Chapas also stated that "[i]n this case, as in the Belton case, appellant was the occupant of an automobile who had been removed from the vehicle and placed under arrest." Id. at 1104-05 The district court compared the facts of its case to Belton, found the circumstances to be analogous, and therefore applied the bright-line rule. Hence, it can be inferred that the bright-line rule does not apply, as clarified by Knowles, when its application has been extended to a situation not contemplated by the Supreme Court in Belton. Rather, the Chimel factors of threat to officer safety or the necessity of preservation of evidence must be present to validate the search.

In State v. Vanderhorst, 419 So. 2d 762 (Fla. 1st DCA 1982), the defendant was arrested for being intoxicated, and a subsequent search of his car revealed four quaaludes. The confrontation with the officer and the subsequent arrest and search were two-and-one-half hours after defendant's vehicle got stuck in the mud. The district court stated:

> Because Belton incorporated within its opinion that language from Chimel limiting the scope of an officer's search which is reasonably incident to a lawful arrest, it follows that unless the arrestee was himself a recent occupant of the vehicle, the Belton rule has no applicability.

Id. at 764. The district court stressed that Chimel's justification was to deter an attempt made by the arrestee to remove any weapons that might aid in an escape, as well as to prevent the concealment or destruction of evidentiary items. Because the district court did not find the facts to be analogous to Belton, in that the timeliness was lacking, the court then shifted its focus to the concerns of officer safety and evidence preservation, which the court held could not be present at a

time so far removed, and accordingly ruled the search was invalid. Again, when the foundation of Belton is extended beyond its original parameters, the bright-line rule is not automatically invoked.

The issue for us to decide in the present case is whether Belton extends to a situation where the first contact the defendant has with the officer occurs after exiting the vehicle. We find the recent analysis of the Sixth Circuit Court of Appeals in United States v. Hudgins, 52 F.3d 115, 119 (6th Cir. 1995), persuasive:

> The search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer.
>
> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartments falls within the scope of Belton and will be upheld as reasonable. See United States v. Strahan, 984 F.2d 155, 156 (6th Cir. 1993). . . . Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the

> automobile. See United States v. Thomas, 11 F.3d 620, 628 (6th Cir. 1993); United States v. Patterson, 993 F.2d 121, 122-23 (6th Cir. 1993) (per curiam); [United States v.] White, 871 F. 2d [41], 44 [(6th Cir. 1989)]; United States v. Hatfield, 815 F.2d 1068, 1071-72 (6th Cir. 1987). However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary. See Strahan, 984 F.2d at 159 (stating that Belton was inapplicable and concluding that the search was unreasonable under Chimel).

(Emphasis added; citations omitted.)

We must caution, however, that in adopting this rationale, this Court is mindful that the arrest and subsequent search should not be invalidated merely because the defendant is outside of the automobile. The occupants of a vehicle cannot avoid the consequences of Belton merely by stepping outside of the vehicle as the officers approach. See United States v. Mans, 999 F.2d 966, 968-69 (6th Cir. 1993) (upholding Belton search where officer's first verbal contact with defendant was when defendant was outside the car on ground that officer had initiated contact with defendant earlier when defendant knew he was being followed by officer); State v. McLendon, 490 So. 2d 1308, 1309 (Fla. 1st DCA 1986) (highlighting the fact that "[t]o distinguish between arrests of persons in the car from arrests of persons recently vacating the car serves to severely diminish the purpose of the Belton decision").

In conclusion, we hold that Belton's bright-line rule is limited to situations where the law enforcement officer

initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile. Applying the aforementioned analysis to the present situation, the record is clear that the defendant did not exit the vehicle upon the direction of the law enforcement officer. Because Belton does not apply, the trial court must determine whether the factors in Chimel justify the search of Thomas's vehicle. See Hudgins, 52 F. 3d at 199 (concluding that where Belton is inapplicable, then "a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary"). Based on the record in front of us, we are unable to ascertain whether Officer Maney's safety was endangered or whether the preservation of the evidence was in jeopardy. Under our interpretation, these findings are critical to a determination of the outcome, and therefore we quash the decision under review and remand for further proceedings consistent with this opinion.

It is so ordered.

SHAW, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion.

QUINCE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., concurring in part and dissenting in part.

I concur in the result in this case because I believe that the United States Supreme Court decision in Knowles v. Iowa, 525 U.S. 113 (1998), is a Supreme Court application of the Fourth Amendment to the United States Constitution that is sufficiently analogous to control the specific facts here. In this case there was no reasonable basis related to the vehicle to search Thomas; nor was there an arrest made related to the vehicle.

However, I dissent from the dicta which places serious limitations on New York v. Belton, 453 U.S. 454 (1981), that are not within the United States Supreme Court's decision. Pursuant to article I, section 12, we are bound by interpretations in respect to the Fourth Amendment by the United States Supreme Court. In Belton, the court held only that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460. Belton does not add as a condition "where the law enforcement officer initiates contact with the defendant either by actually confronting the defendant or signaling confrontation with the defendant." The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

Second District - Case No. 97-03576

(Polk County)

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for Petitioner

Robert A. Butterworth, Attorney General, Robert J. Krauss, Senior Assistant Attorney General, and John W. Klawikofsky, Assistant Attorney General, Tampa, Florida,

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FEB 20 2001 (3)

Supreme Court, U.S.
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Case No. 00-391

In The
Supreme Court Of The United States

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was substantially as follows:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE ABILITY TO CONDUCT A SEARCH INCIDENT TO AN ARREST OF A RECENT OCCUPANT OF A MOTOR VEHICLE IS CONDITIONED UPON A LAW ENFORCEMENT OFFICER "INITIATING CONTACT" WITH THE DEFENDANT CONFLICTS WITH NEW YORK v. BELTON AND DECISIONS OF FEDERAL AND STATE COURTS?

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Case No. 00-391

In The
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STATE OF FLORIDA,

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v.

ROBERT A. THOMAS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as Thomas v. State, 761 So. 2d 1010 (Fla. 1999). (JA 135-45).

The opinion of the Florida District Court of Appeal, Second District, is reported as State v. Thomas, 711 So. 2d 1241 (Fla. 2d DCA 1998). (JA 130-34).

Respondent filed a motion to suppress which is not reported. (JA 3-14). Following an evidentiary hearing on that motion (JA 15-127), the trial court granted the motion. (JA 128-29).

JURISDICTION

The Supreme Court of Florida issued its decision on October 14, 1999. Petitioner's Motion for Rehearing was denied on June 8, 2000, in light of a revised opinion entered that date. On September 5, 2000, Florida filed a petition for writ of certiorari, which this Court granted on January 8, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be

inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out by the Florida Supreme Court in the body of its decision, are as follows:

> On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle. (JA 135-36).

Based on these facts, the trial court, following a hearing, granted Thomas's motion to suppress based upon State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). Relying on

New York v. Belton, 433 U.S. 454 (1981), the district court of appeal held the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, therefore the search was lawful as it was incident to the valid arrest of Thomas. See Thomas, 711 So. 2d at 1243. (JA 136).

The Florida Supreme Court reversed, holding that on these facts, the lower appellate court's decision was in error. The court adopted a position which limited any bright-line rule set forth in New York v. Belton, 433 U.S. 454 (1981), to "situations where the law enforcement officer initiates contact with the defendant...." (JA 142-43). The Florida Supreme Court determined that because the defendant did not exit his vehicle upon the direction of the law enforcement officer, Belton did not apply. (JA 143).

SUMMARY OF ARGUMENT

The Florida Supreme Court's determination that the Fourth Amendment forbids a search incident to a valid custodial arrest of a recent occupant, absent the condition that the law enforcement officer initiates contact with the arrestee, is erroneous. Such conclusion is contraindicated by decisions of the Court and erects an inflexible barrier to effective law enforcement. The decision ignores that the arrest itself provides the justification for a search of the arrestee's vehicle.

In so deciding, the Florida Supreme Court added a condition or requirement to Belton which is neither contemplated nor compelled by that decision or any comparable fact scenario. The Florida Supreme Court rejected precedent which embraces the bright-line rule in Belton and instead adopted a diametrically opposite requirement of a case-by-case examination of the facts presented. This latter approach is a hindrance to effective and practical law enforcement because it requires, depending on the factual scenario, a police officer to divine the subjective intent of the arrestee. Under this approach a search could only be conducted of an arrestee who voluntarily exited his vehicle prior to initiation of contact by the officer if that arrestee perceived the police presence. This will likely result in inconsistent application of the law in the lower courts.

ARGUMENT

WHETHER THE FOURTH AMENDMENT REQUIRES THAT A LAW ENFORCEMENT OFFICER INITIATE THE CONTACT WITH AN ARRESTEE BEFORE A VALID WARRANTLESS SEARCH OF THE ARRESTEE'S VEHICLE INCIDENT TO THE ARREST MAY BE CONDUCTED? (RESTATED)

In New York v. Belton, 453 U.S. 454, 460 (1981), the Court created the bright-line rule that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile." *Sub judice*, the Florida Supreme Court determined that the Belton bright-line rule does not extend to a situation where the first contact the defendant has with the officer occurs after the defendant has exited the vehicle of his own accord. Petitioner submits that the correct and more logical view is: If a valid custodial arrest of an occupant or recent occupant of a motor vehicle has been effected, a contemporaneous search of that vehicle incident to that arrest may be undertaken. Any requirement that the officer initiate contact with the arrestee is compelled neither by Belton nor by other persuasive authority nor logic.

In Belton, the Court opined that there be straightforward rules to guide police officers in the exercise of their duties: "'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" Id. at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)). Indeed, the Belton bright-line rule exists in order to apprise law enforcement of those factors within which they apply and permit consistent application of the rule to circumstances they encounter. Whether a valid search of a recent occupant's vehicle incident to arrest is to be conditioned on the police officer initiating contact with the arrestee serves only to blur, if not totally erode, the Belton principle. It is constitutionally unnecessary to differentiate between an arrest of a recent occupant who may have exited his vehicle of his own volition and a recent occupant who was initially confronted by a police

officer. The same justification for the search exists, namely the concern for officer safety and the need to preserve evidence, regardless of whether the police officer initiates contact with the arrestee. This justification is presumed whenever there is an arrest and there is no need to inquire whether an officer has concern that the arrestee may be armed or whether the arrestee is concealing evidence. United States v. Robinson, 414 U.S. 218, 235-36 (1973). It is the arrest itself, and not who initiated contact with whom, which is the significant constitutional basis to permit a warrantless search.

A Contemporaneous Search of the Passenger Compartment of a Vehicle Incident to the Arrest of a Recent Occupant of That Vehicle is Reasonable Irrespective of Whether the Police Initiated Contact With the Arrestee.

The holding of the Florida Supreme Court represents an unworkable test necessarily involving the subjective impressions of an arrestee which would need to be divined by the courts on a case-by-case basis. This is so because Florida would permit a Belton search where the arrestee exited his vehicle only upon perceiving the police presence or, of course, as a direct result of the police officer's request. Such a determination is a factual and practical impossibility. It is unreasonable to expect a police officer in the field to know whether he may conduct a search of a vehicle based upon the subjective impressions of the arrestee. Arrest alone is the triggering mechanism which permits a search incident to that arrest.

In Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983), the Court noted that an arrest itself is a significant event which, in and of itself, justifies an "automatic" search incident to that arrest. This Court stated that a Belton search would have been proper had the defendant been arrested. Id. at 1035 n.1. Based upon the Florida Supreme Court's decision, an opposite result would obtain because Long had already exited the vehicle before being confronted by the police.[1]

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[1] In Long, the defendant was observed driving erratically and at an excessive speed. The car swerved off the road and the officers stopped to

As the dissent points out herein, the test employed by the majority undermines the underpinnings of the Belton bright-line rule: "Belton does not add as a condition where the law enforcement officer initiates contact with the defendant either by actually confronting the defendant or signaling confrontation with the defendant." (JA 144). However, the dissent erroneously concurred with the majority in concluding that Knowles v. Iowa, 525 U.S. 113 (1998), was sufficiently analogous to the instant facts, finding that there was no reasonable basis related to the vehicle to search Thomas, nor was there an arrest made related to the vehicle. (JA 144).

Because arrest alone triggers a Belton search, reliance by the Florida Supreme Court on Knowles is misplaced. There was no arrest in the Knowles case, merely the issuance of a traffic citation. The Court, in Knowles, determined that the two rationales relied upon to support a search incident to an arrest, officer safety and the need to preserve evidence, are either not present to the same extent or are not present at all in citation issuance situations as opposed to custodial arrest situations. These rationales **are, however, present in every custodial arrest situation**. That is why the facts surrounding a custodial arrest (such as who initiated contact with whom) are "irrelevant" in applying the Belton bright-line rule. If a valid custodial arrest of a recent occupant of a motor vehicle has been effected, a search of that vehicle incident to that arrest may be undertaken. Or stated otherwise, the issuance of a citation (as in Knowles) is not the functional equivalent of a custodial arrest (as in Belton and as in the instant case), and as between the two, only the arrest can trigger a search of a recently occupied vehicle. Knowles does not and can not control the instant case -- Belton clearly does. See United States v. McLaughlin, 170 F.3d 889 (9th Cir. 1999) (holding that Belton, not Knowles, controls searches incident to arrest).

In the context of a search incident to arrest, the key question ultimately is one of reasonableness. This Court has expressed a concern and recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to the police officers. In Pennsylvania v. Mimms,

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investigate. Long met the officers at the rear of the car.

434 U.S. 106 (1977), the Court held that police may order persons out of an automobile during a traffic stop and may frisk those persons if there is a reasonable belief that they are armed and dangerous. In Maryland v. Wilson, 519 U.S. 408 (1997), this Court extended the Mimms rule to passengers as well as drivers. In these traffic stop scenarios, the liberty interests of the persons detained are significantly greater than those of a person who has actually been placed under custodial arrest. Therefore, in the context of a search incident to arrest, it is reasonable for the police to conduct a search of a vehicle for purposes of officer safety. Likewise, concern for the safety of police officers in the context of protective sweeps made in conjunction with an in-home arrest has been addressed and upheld. Maryland v. Buie, 494 U.S. 325 (1990). If it is reasonable for the police to be able to protect themselves in homes, it is certainly reasonable for the police to be able to protect themselves on the street when they place an individual under arrest. This is true regardless of whether they initiate contact with the arrestee or not. Belton applies in a situation where the defendant has been handcuffed and placed in a squad car. See, e.g., United States v. Karlin, 852 F. 2d 968 (7th Cir. 1988). Certainly, concern for officer safety does not dissipate upon removal of the arrestee from the immediate vicinity of his vehicle where, for example, confederates are present at the scene. Officer safety concerns exist in a custodial arrest situation regardless of whether a police officer initiated contact.

Belton's bright-line rule is not without limits. Indeed, certain factual situations will present temporal and spatial expansion that will render a search unreasonable, but whether the police officer initiated contact is not one of the factors to consider in the reasonableness calculus. Those federal courts which have adopted the Belton bright-line rule rather than the "who initiated contact" rule reflect the more reasonable and workable approach which serves to clarify these boundaries. For example, in United States v. Snook, 88 F.3d 605 (8th Cir. 1996), a police officer received information from the dispatcher that a warrant was outstanding for Snook's arrest and that Snook could be found at a particular location. Upon arriving at that location the officer saw Snook who was just stepping out of his vehicle. The court upheld a search of the vehicle incident to the arrest pursuant to Belton. "The fact that Snook had just stepped out of his vehicle as the officer arrived and

before his arrest does not alter his status as an 'occupant' of the vehicle." Snook, 88 F.3d at 608. In Snook and in this case, it was argued that Belton did not apply since the defendant had just stepped out of the car and was not an occupant at the time of his arrest. Snook, 88 F.3d at 607. The Eighth Circuit explicitly rejected this argument and determined that although Snook stepped out of his vehicle of his own accord, he was an "occupant" for purposes of Belton.[2] See also United States v. Riedesel, 987 F.2d 1383 (8th Cir. 1993) (despite the defense claim that he was not an occupant at the time of arrest, a Belton search was permitted where the defendant was arrested while outside of his vehicle).

In United States v. Franco, 981 F.2d 470 (10th Cir. 1992), the court upheld the search incident to an arrest of a defendant who was in a government truck, and not his own vehicle which was in close proximity, at the time of arrest. "Such a search is permissible notwithstanding the fact that the arrestee is out of the automobile and under the control of the officer. Franco was a recent occupant of his vehicle and the arrest was made in close proximity to his vehicle." Franco, 981 F.2d at 473 (citation omitted). In reviewing the policy considerations behind Belton, the court relied upon its prior decision in United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985), and reiterated that the law does not require the arresting officer to sift through all conceivable possibilities that a weapon or evidence may be within reach of an arrestee before a search may be undertaken.

In United States v. Arango, 879 F.2d 1501 (7th Cir. 1989), the defendant was approximately one block from the scene of the crime at the time of his arrest. The court found the search was consistent with Belton in order to protect persons and

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[2] Under the factual scenario presented, perhaps it would have been more proper for the court to use the term "recent occupant" rather than "occupant." This Court in Belton included the term "recent occupant" in its analysis: "While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its **recent occupant**." 453 U.S. at 460.

evidence. The court relied on United States v. Cotton, supra at 1148, quoted in United States v. Karlin, 852 F.2d 968, 970 (7th Cir. 1988), and held the law:

> does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle.

Arango, 879 F.2d at 1506-07. The decision in Arango reaffirmed that Chimel[3] and Belton "recognize the need to prevent an arrestee or a confederate[4] from destroying evidence located in the area." Arango, 879 F.2d at 1505. See also United States v. Sholola, 124 F.3d 803 (7th Cir. 1997) (officer asked defendant if he had a car and where it was parked; at time of arrest the defendant was standing near the open driver's side door and could have secured a weapon). Other federal circuits have also sanctioned a Belton search where the initial contact between police officer and arrestee occurred only after the defendant had exited the vehicle of his own accord. See United States v. Bautista, 731 F.2d 97 (1st Cir. 1984) (upholding a Belton search where agents arrested a codefendant

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[3] Chimel v. California, 395 U.S. 752 (1969), held that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area within which he may reach.

[4] Interestingly, when Respondent Thomas parked in the driveway of the Crall's residence, Mrs. Crall, the Respondent's aunt, and Nicki Thomas, the Respondent's sister, were in the house. It is conceivable that, given the right circumstances, one of these nearby "confederates" might have been able to access the contents of the vehicle Thomas was driving.

who was standing beside an open door of a car); United States v. Schecter, 717 F.2d 864 (3rd Cir. 1983) (upholding a Belton search where troopers arrived at scene shortly after accident and found defendant "stumbling about" the auto).

A plethora of state courts have similarly concluded the reasoning of Belton exhibits a more practical policy consideration and promotes an interpretation of the rule which can be easily applied by the officer in the field: A valid custodial arrest of a recent occupant of a motor vehicle is the only condition required to be met in order to conduct a contemporaneous search of the vehicle incident to that arrest. In State v. Wanzek, 598 N.W.2d 811 (N.D. 1999), for example, the court observed:

> We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle. In our view, these decisions undermine the purposes behind the "bright-line" rule established in Belton. The purposes behind Belton were two-fold: to create a single familiar standard to guide police officers in automobile searches and to eliminate the need for litigation in every case to determine whether the passenger compartment of the vehicle is within the scope of a search incident to arrest. (citations omitted) Furthermore, these decisions raise grave public policy issues because they create serious concerns for the safety of officers and others. By drawing a distinction between an occupant and a recent occupant of a vehicle, we would encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached. (citation omitted) Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search. (citation omitted) If Belton is read to preclude searches where police contact occurs after the suspect exits the vehicle, suspects could conceal evidence and weapons by merely stepping outside the vehicle whenever they saw an officer approaching. (citations omitted)

598 N.W.2d at 815. The Wanzek court held that a valid Belton search was conducted where the defendant stepped out of her car immediately prior to arrest and was standing at the rear of the automobile at the time of arrest.

In Glasco v. Commonwealth, 513 S.E.2d 137 (Va. 1999), the Supreme Court of Virginia determined that a defendant, who parked, voluntarily left his vehicle and then walked across the street where the police officer initiated contact, was a recent occupant of a vehicle which could be searched incident to the valid arrest of the defendant. In so holding the court stated:

> [W]e are not persuaded by the authorities that have decided that an arrestee is an occupant or recent occupant of an automobile only if the police officer initiates contact with the arrestee before that person exits the vehicle. That kind of limitation assumes that an individual, who voluntarily gets out of an automobile, is not aware of the presence of a police officer, or having such knowledge, it did not prompt the person to exit the vehicle. We do not believe that those assumptions are always warranted. Moreover, a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact. That suspect could also conceal evidence in the vehicle and effectively prevent an officer from discovering it by getting out of his or her automobile.

513 S.E.2d at 141-42. Relying upon Glasco, the court in Cason v. Commonwealth, 530 S.E.2d 920, 924 (Va. Ct. App. 2000), held that the only prerequisites to a lawful search incident to an arrest are that the search is contemporaneous with the arrest and the arrestee is a recent occupant of the vehicle. Although the officer did not see the arrestee on a moped, the officer saw the arrestee, who was carrying a motorcycle helmet, approach from a location in a nearby yard where he later reported the moped was parked. Because the arrestee was a recent occupant of the moped, the moped was validly searched incident to the arrest.

In People v. Savedra, 907 P.2d 596 (Colo. 1995), the court upheld a Belton search where the arrestee and a passenger had

exited the truck when the police drove into the parking lot where the truck was parked. The court determined that:

> The justification for both the Chimel and Belton rules is clarification of the rights and responsibilities of police officers when faced with an evolving confrontation resulting in arrest. The warrant exceptions created by Chimel and Belton are designed to permit police officers to protect themselves from harm, and to avoid the destruction of evidence. Given that reasoning, it is illogical to distinguish between someone who is ordered out of a vehicle by a police officer and someone who exits the vehicle anticipating or trying to avoid imminent police contact. In both situations suspects are equally capable of concealing evidence or weapons in the vehicle and may be equally motivated to do so.

907 P.2d at 601.

The court in People v. Bosnak, 633 N.E.2d 1322, 1325 (Ill. App. Ct. 1994), assumed the trial judge found that the defendant did not see the officer's emergency lights and that the officer did not make initial contact with the defendant until the defendant parked his car and walked ten (10) yards from it. The court held:

> Where, as in the present case, the officer pursues an automobile based upon his recent observation of the driver's actions, and arrests the driver who has just exited the vehicle and is still within its immediate vicinity, the officer may reasonably consider the driver to be a "recent occupant" within the contemplation of Belton, so that a search of the passenger compartment incident to the arrest will be authorized.

633 N.E.2d at 1326.

Likewise, in People v. Stoffle, 3 Cal. Rptr. 2d 257 (Ct. App. 1992), the court therein held that an automobile search incident to arrest is permitted even though the defendant is not actually sitting in the car when arrested. If a close association with the car is demonstrated at the moment of arrest, the

arrestee is considered a "recent occupant." This can be shown where the arrestee has acknowledged he owns the car, where the arrestee has recently been physically in the car, or where the arrestee is close enough to the car to continue to have access to it.[5]

In contrast, the Florida Supreme Court determined that the Belton bright-line rule does not extend to a situation where the first contact the defendant has with the police officer occurs after the defendant has exited the vehicle of his own accord: "Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile." (JA 142-43) The Florida Supreme Court found "more persuasive" the decision of the Sixth Circuit in United States v. Hudgins, 52 F.3d 115 (6th Cir. 1995), wherein it was held:

> Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile.... However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary....

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[5] Nebraska courts have upheld a Belton search under similar situations. Adopting the reasoning of State v. Gonzalez, 487 N.W.2d 567 (Neb. Ct. App. 1992), the court in State v. Adams, 585 N.W.2d 96 (Neb. Ct. App. 1998), held that a suspect who gets out of his car before a police officer can get out of his is nonetheless still a recent occupant of the vehicle, and a Belton search is justified.

Hudgins, 52 F.3d at 119 (citations omitted).[6] But see United States v. Mans, 999 F.2d 966 (6th Cir. 1993) (finding a Belton search permissible where defendant had exited his vehicle before being asked to stop by officer).

In United States v. Fafowora, 865 F.2d 360 (D.C. Cir. 1989), the court held a search incident to arrest was improper where the defendants were walking away from their vehicle and the contact occurred well outside of the car. The court determined that no bright-line rule is required when the arrestee is not in the immediate vicinity of the car because the Chimel analysis should be employed.[7]

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[6] Previously, the Sixth Circuit had determined in United States v. Strahan, 984 F.2d 155 (6th Cir. 1993), that a defendant who had exited his vehicle and was approximately thirty (30) feet from his vehicle when arrested could not have his vehicle subjected to a search incident to arrest. The court decided that since Strahan was not an occupant of the vehicle when arrested, Chimel, and not Belton, applied. However, an argument can be offered that Strahan was wrongly decided even employing the "who initiated contact" condition. Testimony of the police officers, which was accepted by the magistrate judge, indicated that the defendant hurriedly left his vehicle "because he recognized the police vehicle." Strahan, 984 F. 2d at 156-57. If the defendant felt compelled to move hurriedly because of his perception of the police presence, such "contact" was initiated by the police under the holdings of other courts sufficient to permit a search incident to Strahan's arrest.

[7] Also, in United States v. Adams, 26 F.3d 702 (7th Cir. 1994), the court held a search of a vehicle is not justified incident to arrest where the defendant was not an occupant immediately prior to arrest and was not affirmatively linked to the vehicle until after he was detained and handcuffed. The court relied upon Chimel and observed that the defendant was in no position at the moment of his arrest to remove weapons or evidence. Also relying on the theory that a search of a vehicle incident to an arrest is predicated on the ability of the arrestee to reach into the vehicle to reach weapons or evidence, the court in United States v. Charles, No. CRIMA00-20022-01-KHV, 2000 WL 575043 (D. Kan. May 1, 2000), refused to sanction a Belton search where the government failed to show the defendant was a recent occupant at the time of arrest. Although neither Adams nor Charles deal precisely with the question at bar, it can be inferred from the language used in deciding them that they are more akin to Hudgins,

Some state courts have also embraced the theme that Chimel should guide the question rather than the Belton bright-line rule. In Commonwealth v. Santiago, 575 N.E.2d 350 (Mass. 1991), the court held that where the defendant had already left his automobile by the time the officers apprehended him pursuant to a search warrant and, since the defendant was taken inside his apartment, the automobile "was no longer within the defendant's immediate control." Thus, there "was no danger that he could draw a weapon from the vehicle or attempt to conceal or destroy contraband which remained in it." 575 N.E.2d at 353-54. Similarly, in Gibson v. State, 733 N.E.2d 945 (Ind. Ct. App. 2000), a defendant was arrested on an outstanding warrant after having parked his van at a convenience store and exited the vehicle. The court held that the subsequent search should have been limited to the defendant's person and should not have extended to the vehicle. The court determined that a search of the vehicle incident to the arrest was improper because "[t]he interior of the van was not within the area of Gibson's immediate control, the area from within which he might have gained possession of a weapon or destructible evidence." 733 N.E.2d at 955.[8]

Citing Hudgins, supra, as persuasive and adopting its reasoning as its own, the Court of Appeals of Michigan held that Belton did not apply where the defendant voluntarily exited his vehicle and was not in control of the vehicle at the time of arrest. People v. Fernengel, 549 N.W.2d 361 (Mich. Ct. App. 1996). The defendant was arrested on an outstanding warrant when he was approximately twenty (20) to twenty-five (25) feet

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Strahan and Fafowora, cases which have added an unreasonable limitation of Belton. These cases have unnecessarily relied upon the Chimel reasoning rather than the more expansive holding of Belton.

[8] Also, the court in State v. Porter, 6 P.3d 1245 (Wash. Ct. App. 2000), in reliance upon the "greater protection" of the Washington state constitution, held that where a van was not within the immediate reach of an arrestee at the time of arrest no search of the van incident to the arrest could be maintained. The arrestee, due to being three hundred (300) feet away from the van, had no opportunity to destroy evidence or obtain a weapon from inside the van. See also State v. Wheless, 14 P.3d 184 (Wash. Ct. App. 2000).

away from his van. See also State v. Foster, 905 P.2d 1032 (Idaho Ct. App. 1995) (a warrantless search incident to arrest is limited to a search of a vehicle that was occupied by the defendant at the time of arrest or when police contact was initiated.); Lewis v. United States, 632 A.2d 383 (D.C. 1993), (holding that where the defendant had parked and locked his vehicle and had walked approximately fifteen (15) to twenty (20) feet away from the car when he was stopped by a police officer, the defendant was not an "occupant" and, therefore, a Belton search was not warranted).[9]

The court in State v. Kelly, 963 S.W.2d 866 (Tex. Ct. App. 1998), disallowed a Belton search where the defendant exited his vehicle prior to police contact and where the defendant was removed by time and space from the vehicle at the time of arrest. In determining whether the defendant was a "recent occupant" at the time of his arrest, factors such as temporal and spatial proximity are to be considered. Where the defendant had been out of his car for approximately ten (10) minutes and was physically distanced from his vehicle at the time of arrest, he was no longer a recent occupant and the justification for a Belton search did not exist. But see Pettigrew v. State, 908 S.W.2d 563, 570 (Tex. Ct. App. 1995) ("Applying the bright-line rule to this case, the search of appellant's car was a lawful search incident to arrest because the police officers observed appellant driving the vehicle immediately prior to arresting him only feet from where the vehicle was parked. Abandoning the 'recent occupant' provision would create an incentive for detainees to attempt to flee the scene to avoid a search.").

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[9] The facts of Lewis show that the officer saw the defendant operate and park the car and that the officer "approached that car and the defendant got out of the car." 632 A.2d at 384. There is no indication that the defendant was aware of the officer's presence until he was "stopped rather quickly" some fifteen (15) feet from the car. Id. Following United States v. Fafowora, supra, the Lewis court concluded that the rule allowing a search of a vehicle incident to arrest is confined to cases where police confront or signal confrontation while the defendant is an occupant.

Arrest Alone is Sufficient to Conduct a *Belton* Search Without Regard to Whether the Police Officer Initiated Contact With the Arrestee.

In Washington v. Chrisman, 455 U.S. 1, 7 (1982), this Court envisioned the potential dilemma and held:

> Every arrest must be presumed to present a risk of danger to the arresting officer. Cf., United States v. Robinson, supra, at 234, n.5, 94 S.Ct. at 476, n.5. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that [the defendant] could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after the fact assessment of the particular arrest situation. Cf., New York v. Belton, 453 U.S. 454, 458-460, 101 S.Ct. 2860, 2863-2864, 69 L. Ed. 2d 768 (1981); United States v. Robinson, supra, 414 U.S. at 235, 94 S. Ct. at 476. (emphasis supplied).

Mandating a court to determine the intent of the arrestee at the time contact is initiated severely limits the holding of Belton and, indeed, is contraindicated by the precedent of this Court. Moreover, requiring a police officer to make a subjective decision on the spot as to whether the arrestee exited his vehicle upon perceiving the police presence results in an impracticable test and not the clear cut guidance fostered by Belton. A valid arrest of a recent occupant of a motor vehicle, without more, justifies a search incident to arrest under Belton. It is constitutionally immaterial whether the officer initiates contact with the arrestee.

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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STATE OF FLORIDA,

Petitioner,

vs.

ROBERT A. THOMAS,

Respondent.

On Writ Of Certiorari
To The Florida Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether this Court's holding in *New York v. Belton*, 453 U.S. 454 (1981), extends to a situation in which the first contact the defendant has with the officer occurs after he has voluntarily exited the vehicle.

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STATEMENT OF THE CASE

On February 28, 1997, Detective J.D. Maney of the Polk County Sheriff's Office went to the residence of Mr. and Mrs. Crall on information that marijuana was being sold from the residence. (JA-22, 23) Maney obtained consent to search the residence and marijuana was eventually found inside.[1] (JA-28-31) After Mrs. Crall was arrested and handcuffed, four or five narcotics detectives arrived, and Maney went outside and sat in his patrol car. (JA-21, 115)

While Maney was in his patrol car, the respondent, Robert Thomas, drove up to the house, parked his car in the driveway, and got out. (JA-115-116) As Mr. Thomas walked toward the rear of the car, Maney got out of his vehicle and met Mr. Thomas at the rear passenger side of the car. (R116, 118) Maney asked Mr. Thomas his name and whether he had a driver's license. (JA-116) He admitted he could not demand identification because Mr. Thomas "hadn't done anything wrong." (JA-116) During the conversation with Mr. Thomas, Maney had no suspicion that there were narcotics in the car. (JA-116, 119)

A driver's license check revealed an outstanding warrant for probation violation. (JA-115, 136) Maney arrested Mr. Thomas, handcuffed him, and escorted him inside the residence where he remained with the narcotics detectives. (JA-120) Maney returned to the car and searched it, discovering illegal narcotics in the glove box

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[1] Evidence seized from the house was suppressed by the trial judge because he found the officers "lacking in credibility," and also because he found their actions "abhorrent." (JA-113)

and in a pocket in the driver's door. (JA-117) Five minutes elapsed between the time that Mr. Thomas exited his car until Maney searched the car. (R118)

Mr. Thomas was charged with possession of methamphetamine. Before trial, he moved to suppress the evidence seized during the search of the car. The circuit court granted Mr. Thomas' motion. (JA-128-129) The Second District Court of Appeal reversed, concluding that "a defendant does not have to be in the vehicle at the time of the arrest and subsequent search in order for the search to be valid under *Belton*." (JA-132) Because there was no evidence that respondent's arrest was a preplanned pretext to conduct a warrantless search of his car, the court ruled that "the bright-line test in *Belton* applies" even though Mr. Thomas was outside of this vehicle when arrested. (JA-133)

The Florida Supreme Court reversed the decision of the Second District. (JA-135-45); *Thomas v. State*, 761 So.2d 1010 (Fla. 1999). After recognizing that *Belton* established "a bright-line rule to be applied in all cases" where the occupant of an automobile is arrested, the court explained that when a search extends beyond *Belton*'s "original parameters, the bright-line rule is not automatically invoked." (JA-141) The court adopted the reasoning of *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995), holding that *Belton*'s *per se* rule is confined to "situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signalling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile." (JA-142-43)

Applying this standard to the facts, the Florida Supreme Court ruled that *Belton* did not apply because Mr. Thomas did not exit the vehicle upon the direction of Detective Maney. (JA-143) The court remanded the case to the trial court to decide whether the search of the vehicle could be upheld as a valid search incident to arrest pursuant to *Chimel v. California*, 395 U.S. 752 (1969).

SUMMARY OF THE ARGUMENT

The petitioner failed to prove that the search of the respondent's vehicle fell within the search incident to arrest exception described in *New York v. Belton*, 453 U.S. 454 (1981), which allows the automatic search of the entire passenger compartment of a vehicle pursuant to the arrest of an "occupant" of that vehicle. In this case, the officer did not initiate contact with the respondent until after he had pulled up into the driveway of a residence, got out of the car, and walked to the rear passenger side. It was not until his arrest on a warrant for probation violation that the officer had authority to seize him. The *per se* rule of *Belton* requires the arrest of the "occupant" of a vehicle. Since Roger Belton was a passenger in the car during the traffic stop, and an occupant of the car when probable cause to arrest arose, it can be assumed that the definition of "occupancy" is restricted to these facts. This case is not controlled by *Belton* because the respondent was not the occupant of the vehicle when the officer confronted him.

Although a search incident to arrest is a recognized exception to the Fourth Amendment warrant requirement, the exception is meant to prevent the arrestee from gaining possession of a weapon or destructible evidence *during an arrest*. It is not meant to prevent concealment of evidence prior to arrest. The Florida Supreme Court's holding below which limits the *per se* rule of *Belton* to situations in which the officer has actually confronted or signaled confrontation with the defendant while he is still inside the vehicle, provides a simple standard for officers in the field and trial judges who review their actions. Although the standard pronounced by the court actually extends the application of the *Belton* rule beyond the facts presented therein, the holding is logically tied to the supporting rationales which justify the exception. Since initiation of contact is the pivotal event which commences the encounter which leads to arrest, it is logical to apply the *per se* rule from that moment forward. However, it is neither reasonable nor constitutional for an officer to search a vehicle when the arrestee has voluntarily moved the epicenter of his "grabbing area" to a point outside the vehicle before the officer initiates contact.

The petitioner has also failed to show that the automatic search of the respondent's vehicle was reasonable in this case. Before the respondent got out of the car, he had not committed any crime or traffic infraction, and he was not suspected of any crime. He moved to the rear passenger side of the vehicle and produced identification although he was not compelled to do so. A warrants check revealed a warrant for probation violation – a

crime unrelated to the operation of the vehicle. The officer then escorted the respondent to the house in handcuffs where he remained with at least four other officers during the search. No weapons or contraband were found on the respondent's person, and there were no other people in the car or near the car during the encounter.

For these reasons, this Court should decline the invitation to extend the *Belton* principle beyond its constitutional underpinnings to allow the search of the respondent's vehicle.

ARGUMENT

WHETHER THIS COURT'S HOLDING IN *BELTON* EXTENDS TO A SITUATION IN WHICH THE FIRST CONTACT THE DEFENDANT HAS WITH THE OFFICER OCCURS AFTER HE HAS VOLUNTARILY EXITED THE VEHICLE.

This case began as a consensual encounter initiated by the deputy after Mr. Thomas had voluntarily stepped out of the car, closed the door, and walked to an area behind the car on the passenger side. (JA-115-118) The search of the automobile that followed cannot be justified as an automatic search incident to arrest under *New York v. Belton*, 453 U.S. 454 (1981), because Mr. Thomas was a pedestrian and not the "occupant" of the vehicle when the officer first approached and asked to speak to him.

Belton does not authorize the search of a citizen's car simply because he has been arrested. *Belton* only allows the search of an "occupant's" vehicle pursuant to arrest, just as *Chimel v. California*, 395 U.S. 752 (1969), allows a

limited search of the grabbing area in a home only if an individual is arrested inside the home. As an aid to the officer in the field, *Belton* simply allows the officer to assume that if an occupant of a vehicle is arrested, the entire passenger compartment of the vehicle (and closed containers therein) are within the arrestee's actual reach. Because the police stopped the vehicle in which Belton was riding and then ordered him out of the car to effectuate the arrest, it follows that in order to be an occupant, an officer has to initiate contact with the arrestee while he is still inside the vehicle. Because Mr. Thomas was outside of the car before the officer initiated contact, *Belton* is not applicable.

A. *Belton* applies the grabbing area defined in *Chimel* to automobile searches.

In *Chimel*, the Court clarified the constitutional scope of a search conducted without a warrant incident to a lawful arrest. In *Chimel*, officers obtained a warrant for the defendant's arrest for burglary of a coin shop. The defendant's wife let the officers into their home to wait for the defendant. When he entered the home, the officers served the warrant and asked if they could "look around." Chimel objected and the officers informed him that based on the arrest they would conduct a search. The officers then looked through the entire three-bedroom house, including the attic, garage and a small workshop looking for evidence. During the search, the officers seized coins and other objects which linked Chimel to the burglary. *Id.* at 753-54.

The *Chimel* Court overruled two cases: *United States v. Rabinowitz*, 339 U.S. 56 (1950),[2] which sanctioned the search of an entire one-room office pursuant to the arrest of Rabinowitz in it, and *Harris v. United States*, 331 U.S. 145 (1947), which upheld the search of a four-room apartment. In holding that the search of Chimel's house had no constitutional justification, *Chimel* limited the scope of a search incident to arrest. The Court held that pursuant to a lawful arrest, the arresting officer may search the person arrested and the area within his "immediate control," meaning the "area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Id.* at 763. The Court found no justification for searching "any room other than that in which an arrest occurs," explaining that "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." *Chimel*, 395 U.S. at 766 (footnotes omitted).

New York v. Belton is founded on *Chimel* and does nothing more than define the *Chimel* grab area with regard to the passenger compartment of a vehicle. In *Belton*, an officer in an unmarked car stopped the car in which Belton was a passenger for speeding on the New York Thruway. After requesting documentation, the officer discovered that none of the occupants of the car

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[2] The Court noted that *Rabinowitz* "ha[d] come to stand for the proposition . . . that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel*, 395 U.S. at 760.

owned the car or were related to the owner. Meanwhile, the officer smelled burnt marihuana and noticed an envelope marked "Supergold," a name he associated with marihuana, in plain view on the floor of the car. At that point, the officer directed all of the men to get out of the car, and placed them under arrest. After frisking the men, the officer positioned them in four separate areas of the Thruway so they would not be within touching area of each other. A search of the envelope revealed marihuana. The officer then searched each of the men and the passenger compartment of the car. On the back seat he found a leather jacket belonging to Roger Belton. The officer unzipped one of the pockets and discovered cocaine.

After determining that the principles of *Chimel* had been difficult to apply in specific cases, the court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[3] *Belton* at 460. The *Belton* Court attempted to provide law enforcement officers with a "set of rules" which would make it "possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 458. The Court reasoned that "the articles inside the relatively narrow compass of the

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[3] In *Belton*, the question before the Court was, "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" 453 U. S. at 455. The Court granted certiorari to determine the "permissible scope" of a search. *Id.* at 457.

passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Id.* at 460.

In reaching its decision, the Court concluded that the search of the passenger compartment was valid even though the arrestees had been taken out of the car because the search followed "immediately upon that arrest." *Belton* at 462. However, the Court warned that the holding applied to the narrow facts before the Court, saying, "Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460, n.2.

7 "*Belton* sought to avoid the case by case evaluations of whether the defendant's area of control within the automobile extended to the precise place where the policeman found the weapon or evidence." *United States v. Fafowora*, 865 F.2d 362 (D.C. Cir. 1989). The *Belton* rule "effectively exchanged the *Chimel* actual grabbing area for a hypothetical grabbing area when the arrest involves a vehicle occupant." *People v. Stoffle*, 3 Cal.Rtpr.2d 257, 260 (Ct. App. 1991).

It naturally follows that if the holding in *Belton* does not apply to a particular set of facts, a *Chimel* analysis must be applied. *See, Thomas*, 761 So. 2d at 1014; (JA-143); *Fafowora*, 865 F.2d at 362.

B. The *Belton* exception to the warrant requirement applies only when the "occupant" of a vehicle is arrested; however, the *Belton* Court did not define the term "occupant."

"*Belton* does not permit searches of arrestees' vehicles; it permits searches of occupants' vehicles incident to lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). "*Belton* clearly limits its application to only those settings where an officer makes a custodial arrest of the 'occupant of an automobile.' " *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993); *Belton*, 453 U.S. at 460. "Therefore, the inquiry mandated by *Belton* is twofold: (i) whether there has been a lawful custodial arrest; and (ii) whether the person arrested was the occupant of the vehicle." *People v. Savedra*, 907 P.2d 596, 598-99 (Colo. 1995). Professor LaFave explains the occupancy requirement:

> . . . [I]t must be emphasized again that *Belton* applies only in the case of 'a lawful custodial arrest of the occupant' of the vehicle. Though some of the post-*Belton* cases fail to give sufficient attention to this limitation, it appears to mean that *Chimel* rather than *Belton* applies whenever the person arrested was not the driver of or a passenger in the vehicle just before the arrest.

3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 7.1(b) (3rd ed. 1996) (footnotes omitted).

The Court did not define the term "occupant" in *Belton*. *See Robb*, 605 N.W.2d at 101.[4] *See Belton* at 456. Because Belton was ordered out of the vehicle after the officer acquired the probable cause necessary to arrest him, the Court did not need to consider whether or not Belton was an "occupant" of the car at the time of arrest. In the case *sub judice* Mr. Thomas had left the car voluntarily before the officer walked over to talk to him. The officer did not remove Mr. Thomas from the vehicle, nor did the officer conduct a traffic stop of his car as had the officer in *Belton*. Also, unlike *Belton*, the officer did not obtain probable cause to arrest Mr. Thomas while he was in the vehicle. For that reason, in deciding whether or not the automatic passenger compartment search was justified under *Belton*, the Florida Supreme Court needed to determine for itself whether or not Mr. Thomas was an "occupant" of the vehicle.

The Petitioner's brief dismisses the fact that the defendant must first be shown to be an "occupant" of the vehicle before a search is justified as an automatic incident to arrest. The underpinning of the Petitioner's argument is that a valid custodial arrest is the only condition required to be met in order to conduct a contemporaneous search of that vehicle incident to that arrest, because the arrest alone triggers a *Belton* search. Petitioner's Brief at 7, 11. In order to reach that conclusion, the Petitioner

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[4] In *Robb*, the court applied *Chimel* instead of *Belton* because the defendant was on a boat on the lake and not near his vehicle when the officer first approached. The fact that he later reached into the vehicle under police supervision to retrieve his license from the dashboard did not convert the defendant into an occupant.

substitutes the words "recent occupant" for "occupant" in applying the holding in *Belton*. Based on that error, the Petitioner concludes that the *Belton* opinion, in and of itself, sanctions the automatic passenger compartment search of all vehicles in all cases in which it can be said that the arrestee had been a "recent occupant" in a temporal or spatial sense. *See* Brief of Petitioner at 5-6.

In *Belton*, the opinion written by Justice Stewart used the words "recent" and "occupant" in conjunction only once, stating:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its *recent occupant*.

Id. at 460 (emphasis added). However, the *Belton* holding does not contain the word "recent." It allows a search of the passenger compartment on the condition that the policeman has first made a lawful custodial arrest "of the occupant of an automobile."[5] *Id.* at 460.

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[5] The term "recent occupant" appears in the dissent written by Justice Brennan. The dissent argued that once "the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband." *Id.* at 465-66. Justice Brennan points out that one of the questions unanswered by the opinion is whether or not it matters if "the police formed probable cause to arrest before or after the suspect left his car." *Belton* at 470.

Roger Belton was removed from the vehicle prior to the search, although the search could have taken place with him in it. Common sense dictates that searches generally take place after an individual has been removed from the vehicle. *See* LaFave § 7.1(a), n.15 at 435. It is clear from the opinion, that for purposes of applying the *Belton* rule, an occupant becomes a "recent occupant" at the time of the search only after the officer has directed the arrestee to get out of the vehicle and he is no longer in it.

"The *Belton* Court made it very clear that the bright-line rule enunciated in that case extended only as far as its factual context." *Lewis v. United States*, 632 A.2d 383, 385-86 (D.C. App. 1993). "The Supreme Court's references in *Belton* to a search after the arrestees are no longer in the automobile and to 'recent occupants' of an automobile clearly pertain to occupants who have been removed by the police, which is what occurred in that case." *Lewis*, 632 A.2d at 386, n.6 (internal quotations omitted). For that reason, in context, the term "recent occupant" should only be employed when a court is called upon to determine whether or not the resulting search is reasonably contemporaneous with the arrest.

In *State v. Kelly*, 963 S.W.2d 866, 869 (Ct. App. Tex. 1998), the court explained:

> "We are mindful that the *Belton* rule was crafted in an effort to free officers in the field from making difficult legal decisions during the often-volatile circumstances of an arrest. *See Belton*, 453 U.S. at 458, 101 S.Ct. At 2863. However, *Belton*'s 'bright-line' only eliminated the officer's need to determine what constitutes the

> area within the arrestee's reach when the area includes the interior passenger compartment of a vehicle and the arrestee is its recent occupant: the 'bright-line' test does not address who is a 'recent occupant' for purposes of being subject to a *Belton*-type vehicular search rather than a *Chimel*-type search."

In a concurring opinion in *Glasco v. Commonwealth*, 513 S.E.2d 137, 142 (Va. 1999)[6], Justice Lacy notes that because *Belton* was not actually sitting in the vehicle when arrested, references to a "recent occupant" in *Belton* have been incorporated into the rule itself. Justice Lacy concludes that nevertheless:

> . . . [N]othing in Belton specifically defined what circumstances qualified an arrestee as a "recent occupant."
>
> Consequently, from its inception, application of the so-called "bright-line" *Belton* rule has not provided clear resolution of the search issues in cases with facts that do not mirror the facts in *Belton* or the precise words of the rule. To date, the U.S. Supreme Court has not

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[6] In *Glasco*, an officer suspected that the defendant was driving without a license. He elected to follow the car in lieu of a traffic stop. After the defendant legally parked the car on the street and began to walk toward a house, the officer activated a rear strobe light and called to the defendant. The officer eventually got confirmation of the license suspension. He then arrested the defendant and searched the vehicle. The majority held the search was valid as incident to arrest under *Belton*. In a concurring opinion, two justices concluded that Glasco was not an occupant under *Belton*, but agreed that the search was based on actual probable cause to believe the vehicle contained contraband.

> addressed whether arrestees with these varying types of connections to the vehicle searched are "recent occupants" of the vehicles under *Belton*.

Id. at 142.

Even though it would be inconceivable to search a car with four people still in it, the fact that Belton was standing outside of the car at the time of the search has generated much concern and confusion.[7] Other opinions cited by the petitioner ignore the occupancy requirement altogether, assuming without discussion, that an arrestee is a recent occupant of a vehicle either because the defense did not argue that he was not an occupant of the car, or because the court failed to see a distinction. *See, e.g., United States v. Schecter*, 717 F.2d 864 (3rd Cir. 1983)

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[7] Many courts wrestle with the concept of "recent occupant" when confronted with an arrestee who, although stopped by the police while in the car, has been handcuffed and placed in a patrol car or otherwise removed from the scene before the search. *See, e.g., United States v. White*, 871 F.2d 41 (6th Cir. 1989) (police may search a vehicle incident to arrest even after the arrestee was handcuffed and placed in the back seat of a police cruiser.); *United States v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999) (search of passenger compartment was a "contemporaneous incident of a lawful arrest" after stop for illegally tinted windows, and arrestee was "recent occupant" even though he was on route to jail because search was conducted only 5 minutes after arrestee departed); *Compare United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search not contemporaneous because it took place 30 to 45 minutes after arrestee was handcuffed and placed in police vehicle). This type of analysis is inevitable (and not supportive of Petitioner's argument) because a warrantless search incident to arrest is not valid if it is "remote in time or place from the arrest." *United States v. Chadwick*, 433 U.S. 1, 14 (1977).

(without discussing whether the defendant could be deemed an occupant, the court applies *Belton* because the officer came upon an accident scene and found the intoxicated defendant stumbling around the vehicle); *United States v. Karlin*, 852 F.2d 968 (7th Cir. 1988) (when the officer arrived, he discovered the defendant on the ground with one foot still inside his van after being captured and dragged out by citizens; court upheld the search of the van incident to arrest without considering the issue of whether or not the defendant was an occupant); *United States v. Bautista*, 731 F.2d 97 (1st Cir. 1984) (without deciding whether or not the defendant was an occupant of the vehicle, the court justifies search of car based on the fact that he was beside an open door and could reach into it). These cases do not aid in the resolution of the issue confronting this Court.

Apart from these cases, are the cases in which the court actually grapples with the issue of occupancy in a situation where the arrestee is encountered outside of the vehicle. In those cases cited in support of Petitioner's argument, the courts have extended the holding in *Belton*, reasoning that because Belton was not inside the vehicle when he was actually arrested or during the search, it is not neccessary that a defendant is in the vehicle when the officer confronts him. *See, e. g., United States v. Snook*, 88 F.3d 605 (8th Cir. 1996) (holding the defendant was an "occupant" of the vehicle because he had just stepped out of it); *Glasco*, 513 S.E.2d at 140 (opinion by the Supreme Court of Virginia upholding the search of a vehicle on the grounds that "the defendant in *Belton* likewise was outside the vehicle when the police officer arrested him and conducted the vehicle search").

These cases exhibit an unacceptably broad interpretation of *Belton*, whereas the Florida Supreme Court's interpretation of *Belton* in this case is appropriately narrow.

C. The Florida Supreme Court adopted the "bright-line" definition of "occupant" developed by the Sixth Circuit which essentially augments the holding of *Belton*.

In this case, the Florida Supreme Court refused to extend the warrant exception created in *Belton* to the search of Mr. Thomas' car because Mr. Thomas was outside of the car before the deputy approached him to ask him his name.[8] The court held that the search of Mr. Thomas' car was not justified under *Belton*, after concluding, "where the defendant has voluntarily exited the automobile and begun walking away from it before the officer has initiated contact with him, the case does not fall within *Belton*'s bright-line rule and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary." *Thomas v. State*, 761 So.2d 1010, 1013 (Fla. 1999), quoting *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993); (JA-142). The *Thomas* court held that *Belton*'s bright-line rule is limited to "situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or signalling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of

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[8] The officer admitted that Mr. Thomas was not suspected of any crime and that he wanted to talk to him to see who he was.

whether the defendant has been removed from or has exited the automobile." *Id.* at 1014, (JA-142-43)

The court decided that the circumstances of Mr. Thomas' arrest were not contemplated by the Court in *Belton*. The court reasoned that "when searches occur beyond the scope of *Belton*'s bright-line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful." *Thomas* at 1012-13. (JA-139). Because Mr. Thomas was not an "occupant" of the vehicle, *Chimel* and not *Belton* applies. Based on that conclusion the court remanded the case to the trial court to determine "whether the factors in *Chimel* justify the search of Thomas's vehicle." *Id.* 1014; (JA143).

The *Thomas* holding establishes a "bright-line" rule for officers to use in determining whether or not an arrestee is the occupant of a vehicle. This definition of "occupant" is taken from language in *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995),[9] in which the court concluded that if an officer initiates contact with the

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[9] In *Hudgins*, two officers saw Hudgins' car run a stop sign. The officers followed the car until they felt it was safe to conduct a traffic stop. They activated the cruiser's blue lights, stopped the car, and ordered Hudgins out of it. During the stop, Hudgins admitted his license had been suspended. The officers arrested Hudgins, searched and handcuffed him, and placed him in the back of the cruiser. They then searched the passenger compartment of the car and found a loaded pistol, over $3,000 in cash and cocaine. Since the officers initiated contact with Hudgins while he was still an occupant of the vehicle, the court held that *Belton* controlled, and that the search was proper as incident to his arrest.

defendant while he is still in the automobile, a search of the passenger compartment not only falls within *Belton*, but it is also "reasonable." *Hudgins*, 52 F.2d at 119. *Hudgins* cites other Sixth Circuit cases, including *Strahan*, 984 F.2d 155. In *Strahan*, the court held that *Belton* applies only when police initiate contact while the suspect is in the vehicle, *and* subsequently remove him as the officers removed Belton from the vehicle.[10]

The *Hudgins-Strahan* rule adopted by the Florida Supreme Court expands the *Belton* rule in that it allows an automatic search as a contemporaneous incident to arrest even though the officer did not have probable cause to arrest the defendant while he was still inside the vehicle, as did the officer in *Belton*. The rule also allows a search incident to arrest even though the officer's contact began as a consensual encounter as opposed to a traffic stop.

The instant opinion dovetails with *Belton* and actually upholds the bright-line rule in an admittedly difficult area. *See State v. Foster*, 905 P.2d 1032 (Idaho Ct. App. 1995) (concluding that "*Belton* objectives and Fourth Amendment principles are best served by limiting *Belton*'s application to searches of automobiles that were occupied by the defendant at the time of arrest or when the police signalled the driver to stop or when contact between the police and the defendant was otherwise initiated").

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[10] The court held that Strahan was not an occupant because Strahan was 30 feet away from the vehicle at the time of his arrest.

The Petitioner contends that the holding in *Thomas* contradicts statements made by the Court in *Michigan v. Long*, 463 U.S. 1032 (1983), pertaining to *Belton*. Petitioner's Brief at 6. In *Long*, the Court's recitation of the facts leading to the encounter is rather brief and it is unclear whether or not the officers were in active pursuit of Long's vehicle as it was speeding and swerving. *See Long v. People*, 320 N.W.2d 866, 868 (Mich. 1982) (facts below included the information that the officers "turned their vehicle around and pursued the speeding vehicle"). However, it is clear that Long, unlike the respondent, would have been subject to seizure for driving erratically and speeding while still in his car. Nevertheless, the statements in *Long* regarding the hypothetical application of *Belton* had Long been arrested are dicta. A statement of this Court that is dictum does not constitute binding precedent. *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997).

The "contact" rule has been adopted by other jurisdictions. *See, e.g., Lewis*, 632 A.2d 383 (defendant was not an "occupant" for purposes of *Belton* because the officer approached and met the defendant 15 to 20 feet from the car after he observed defendant operate the car with no front license plate); *United States v. Tobon-Sierra*, 954 F.Supp. 73 (S.D.N.Y. 1997) (the defendant was not an occupant because he left the automobile as DEA agents approached to arrest him); *Foster*, 905 P.2d 1032 (defendant was not an occupant even though he retrieved identification from the trunk of his car because he did not come into contact with narcotics agents until he knocked on the door of a residence).

Other courts have reached the same results in similar situations without reliance on the *Hudgins* rule. *See*

Fafowora, 865 F.2d 360 (agents followed the defendants and arrested them one car length from their vehicle after they had parked and were walking away); *Gibson v. State*, 733 N.E.2d 945 (Ind. Ct. App. 2000) (driver who was walking toward convenience store when officer approached was not the occupant of the van, even though officer followed him intending to arrest him on an outstanding warrant); *United States v. Adams*, 26 F.3d 702 (7th Cir. 1994) (defendant was not an "occupant" of the vehicle even though he was near it and accidently triggered the alarm deactivator during police detention); *Commonwealth v. Santiago*, 575 N.E.2d 350 (Mass. 1991) (officers with warrant to search the defendant's residence and his person were not justified in searching defendant's car parked in front of the residence because he had already left his automobile by the time the officers apprehended him).

D. The *Thomas* definition of "occupant" provides a workable, easily understood and applied guideline which is reasonably related to the legitimate needs of law enforcement.

An officer in the field (or a trial judge evaluating a search) can easily determine whether or not the officer has initiated contact with someone while he is still in a vehicle. Indeed, in most instances, arrests will be the product of vehicle stops in which the officer signals the driver to stop the vehicle by activating his lights and siren or by using a loudspeaker. In other situations, an officer need only determine whether or not he has spoken to, or otherwise signalled to, someone inside a car. If he has done so, and if he then effectuates a custodial arrest,

he may search the car regardless of whether or not the arrestee voluntarily exits the car after contact has begun. In fact, the *Thomas* court warns that *Belton* applies even if the defendant exits the vehicle upon the officer's approach. *Thomas* 761 So.2d at 1013-14; (JA-142). *Accord, State v. Gonzalez*, 487 N.W.2d 567 (Neb. Ct. App. 1992) (after police pursued defendant's car with sirens activated, the defendant pulled over, got out of the car with his hands raised, and walked toward the cruiser). "A hasty exit from the automobile after an officer has initiated contact does not enable a suspect to avoid a search of the passenger compartment incident to arrest." *State v. Harris*, 942 P.2d 568, 572 (Idaho Ct. App. 1997) (officer pursued defendant with lights activated, intending to question him about harassing phone calls, but defendant drove to his house, got out of car and walked toward the house).

The petitioner argues:

> The holding of the Florida Supreme Court represents an unworkable test necessarily involving the subjective impressions of an arrestee which would need to be divined by the courts on a case-by-case basis. This is so because Florida would permit a *Belton* search where the arrestee exited his vehicle only upon perceiving the police presence or, of course, as a direct result of the police officer's request.

Petitioner's Brief at 6. The original opinion issued by the Florida Supreme Court had a very different holding which read, "when a vehicle search is conducted after a defendant has exited a vehicle, we hold that *Belton*'s

bright-line rule is limited to situations where the defendant has exited the vehicle because of the presence or upon the direction of a law enforcement officer."[11] *See* Motion for rehearing filed by Mr. Thomas, Record at 57-61. On motion for rehearing, Mr. Thomas argued, among other things, that it would be impractical for a law enforcement officer to determine the motivation of another individual. Record at 57-61. Consequently, the Florida Supreme Court modified its holding to its present form. The current holding in *Thomas* is clear that as long as the officer has initiated contact, *Belton* applies.[12] It makes no difference if the arrestee has complied or not, or if he even sees the officer.

The petitioner urges this Court to adopt an easy-to-apply "bright-line" rule which would allow a search incident to the arrest of any "recent occupant" of a vehicle. However, the petitioner does not explain how the rule would be a bright-line rule at all. The Petitioner states: "*Belton*'s bright-line rule is not without limits. Indeed,

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[11] The original opinion was withdrawn by the court and was not transmitted with the record.

[12] *Thomas* seems to suggest that if the suspect knows of the presence of the officer, then "contact" has actually been established. *Thomas* at 1014; (JA-142) ("The occupants of a vehicle cannot avoid the consequences of *Belton* merely by stepping outside of the vehicle as the officers approach. *See United States v. Mans*, 999 F.2d 966, 968-69 (6th Cir. 1993) (upholding *Belton* search where officer's first verbal contact with defendant was when defendant was outside of the car on ground that officer had initiated contact with defendant earlier when defendant knew he was being followed by officer")). However, in context, this language must mean the officer must initiate contact.

certain factual situations will present temporal and spatial expansion that will render a search unreasonable. . . . " Petitioner's Brief at 8. However, the petitioner does not offer a definition of "recent occupant" which will explain those limits.[13]

The petitioner's argument overlooks the fact that an officer would have to determine on a case-by-case basis whether or not an arrestee was a "recent occupant" of the vehicle if he does not confront the arrestee while he is still in the vehicle.

> If the rule is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the "bright-line" rule becomes hazy and uncertain. The police officers would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant.

People v. Fernengel, 549 N.W.2d 361, 363 (Mich. Ct App. 1996). In *Foster*, 905 P.2d 1032, the court remarked:

> . . . [E]xtending *Belton* to situations far removed from the facts presented in that case would reintroduce the vagueness and uncertainty that the *Belton* court sought to remove. . . . Any extension beyond the exact limits set by *Belton* would open a new set of temporal and spatial uncertainties, as well as increase the likelihood of

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[13] The *amicus* brief of the Solicitor General concludes that *Belton*'s applicability to "outlying cases" should not concern the Court now. Brief of the United States as *Amicus* at 21, n.7.

> unjustified invasion of the privacy of individuals.

Id. at 1038-39, quoting *United States v. Vaughan*, 718 F.2d 332 (9th Cir. 1983).

The "recent occupant" rule espoused by the petitioner led to the absurd result in *Cason v. Commonwealth*, 530 S.E.2d 920 (Va. Ct. App. 2000), which is cited in support of the petitioner's position. Petitioner's Brief at 12. In *Cason*, the court sanctioned the search of a moped on the grounds that "circumstantial evidence" showed that the juvenile defendant was a recent occupant of the vehicle. The officer did not see the juvenile on the moped. Instead, he saw him emerge from behind a fence with a motorcycle helmet in his hands. The moped which was searched incident to the arrest was found behind the fence in another yard. The court reached the strained conclusion, based on the fact the defendant knew the location of the moped, that he was in "recent possession" of it.

Decisions which consider whether an arrestee was a recent occupant of the vehicle have spawned arbitrary and confusing rules. For example, in *United States v. Sholola*, 124 F.3d 803 (7th Cir. 1997), the court determined the case was governed by *Belton* because the defendant was "positively linked" to the vehicle because he admitted owning it and his key opened the door. However, the officer did not see the defendant driving the car, and there was no evidence regarding when he was last in it. In *United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989), the defendant and a passenger voluntarily left the vehicle as police followed. A conversation with police led to the

defendant's arrest for assault for shoving an officer. The search of the defendant's vehicle was upheld because the officer brought the defendant back to the vicinity of the vehicle to check on the injured officer, placing the defendant "in proximity" to his vehicle. *Id.* at 1506. In *Stoffle*, 3 Cal.Rptr.2d 257, the officer came across two men standing behind a vehicle drinking beer in violation of park rules. In the course of issuing a warning, he discovered an outstanding warrant. The search of the vehicle was upheld because the arrestee had leaned into the car before the officer approached the men. The court established criteria for determining if an arrestee is a recent occupant, saying:

> In that instance there must be circumstances which show the person still had, at the moment of arrest, a close association with the car. Such circumstances exist, for example, where, as here, the arrestee has acknowledged he owns the car, and while staying close to the car continues to have access to it.

Id. at 262. None of these tests would be suitable for accurate application during an arrest situation, and none of these tests provide the certainty the petitioner claims is lacking from the "contact" test.

E. The Petitioner's approach would sever *Belton* from *Chimel* and its Fourth Amendment justification.

The Petitioner argues, "It is constitutionally unnecessary to differentiate between an arrest of a recent occupant who may have exited his vehicle of his own volition and a recent occupant who was initially confronted by a police officer." Petitioner's Brief at 5-6. However, it is this

difference in circumstances which makes the suspicionless search in the instant case unconstitutional.

The search incident to arrest exception is confined to the "immediate vicinity of the arrest." *Shipley v. California* 395 U.S. 818, 819 (1969) (search of the defendant's house was unconstitutional where he was arrested 15 to 20 feet away as he left his car); *Stoner v. California*, 376 U.S. 483, 486 (1964). It does not extend to areas adjacent to the place of arrest. For example, in *Vale v. Louisiana*, 399 U.S. 30 (1970), officers had two warrants for the defendant's arrest. They set up surveillance at his residence and while they were watching, the defendant came out of the residence and made contact with a man inside a car parked outside the residence. The defendant then returned to the house and reappeared a few minutes later and acted as if he were conducting a narcotics transaction. The officers converged and the defendant started back toward the house. The officers arrested Vale on the front steps of the house and took him inside and eventually searched the house. *Id.* at 32.

The Louisiana Supreme Court upheld the search because it occurred "in the immediate vicinity of the arrest" of Vale. The Court reversed, saying: "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, . . . not somewhere outside – whether two blocks away, twenty feet away, or on the sidewalk near the front steps." *Id.* at 33-34 (Citations omitted). Similarly, a search of an automobile incident to arrest may only occur if it can be said that the arrestee was the actual occupant of the vehicle.

In *Chimel*, the Court explained:

> It is argued in the present case that it is 'reasonable' to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn – or just down the street – than it is when he happens to be in the house at the time of arrest.

395 U.S. at 764. In *Lewis*, 632 A.2d 383, the court explained:

> To extend the definition of "occupant" to include a person who had parked, locked, and walked fifteen feet away from an automobile before being stopped and arrested, and, therefore, to consider that automobile subject to a warrantless search incident to arrest, would . . . indelibly blur the bright-line rule that the Supreme Court painstakingly drew in *Belton*. . . . Indeed, it would defeat the whole purpose of having a bright-line rule, which, in reality, would be severed, without any limiting principle, from the foundation of its rationale in *Chimel*.

If an arrestee is a pedestrian, and not an occupant of a vehicle when the officer confronts him, then extending the scope of the search incident to arrest to the vehicle

would allow a search that is neither "tied to" nor "justified by" the circumstances of the arrest. *See Chimel*, 395 U.S. at 762, quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

In order for a search incident to arrest to be reasonable as opposed to merely exploratory, it must be grounded in at least one of the rationales for which the exception was created: officer safety or the preservation of evidence. *See McLaughlin*, 170 F.3d at 894 (Trott, J., concurring); *Chimel*, at 768; *Thomas*, 761 So.2d at 1012 (JA-139) ("when searches occur beyond the scope of *Belton*'s bright line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful").

When an officer happens upon an individual who is already outside of the vehicle before he initiates contact, neither of these concerns are sufficiently manifest to justify extending the holding in *Belton*. Because the concern for officer safety and the concern for destruction or loss of evidence is not present to the same extent when an officer confronts, and later arrests, an individual who has already left his car voluntarily and is secured away from it, this Court should decline to extend the *Belton* bright-line rule to the search of Mr. Thomas' car. *See Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998) (refusing to extend *Belton* when officer issues a citation in lieu of custodial arrest).

The argument contained in the *amicus* brief of the United States centers around the need to protect officers from weapons that may be hidden inside an automobile. Petitioner argues, in agreement with the United States,

that "investigative detentions involving suspects in vehicles are especially fraught with danger to the police officers."[14] Petitioner's Brief at 7. However, this case does not involve an "investigative detention" of a suspect in a vehicle because Mr. Thomas was not detained in the vehicle. The Petitioner then concludes that searching a non-occupant's car is reasonable for purposes of officer safety because the rationale is present regardless of "who initiated contact with whom." Petitioner's Brief at 5-6, 7. This conclusion is not logical because the epicenter of a suspect's "grabbing area" has been moved to an area outside the car before the officer approaches.

In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court concluded that an individual who is outside of a vehicle poses less of a threat to an officer than an individual inside it. In *Mimms*, the Court was asked to decide the narrow question of whether an officer may order a lawfully detained driver to get out of his car. In

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[14] The Brief of the United States as *Amicus* cites statistics regarding officers killed and assaulted in the line of duty. *Id.* at 8; *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1998). The statistics lack sufficient detail to allow application to the facts in this case. The statistics do not shed any light on whether or not any of the officers killed in the line of duty were killed in a situation presenting these facts. There are no figures indicating whether or not an arrestee who was outside of a vehicle prior to the confrontation reached into the vehicle to grab a weapon. However, the report does show that of the 682 officers killed between 1989 and 1998, 57 of the officers were slain with their own weapons – not with weapons obtained from vehicles after they were placed under arrest. *See Reports* at 4. This statistic implies that the weapon most readily accessible to a suspect is the weapon carried by the officer himself.

weighing the concern of officer safety the Court observed that there is "an inordinate risk confronting an officer as he approaches a person *seated in an automobile.*" *Id.* at 110 (emphasis added). The court also recognized that "[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." *Id.* In order to reduce the risk posed by persons in the car, the Court held that the practice of ordering a detainee out of a car is reasonable. In *Maryland v. Wilson*, 519 U.S. 408 (1997), out of deference for the safety of the officer, the Court extended the rule to passengers in the vehicle. It follows that if the occupant of a motor vehicle voluntarily leaves a car and distances himself from it before an officer has made contact, the danger to the officer is concomitantly reduced. When that individual is then arrested, he will not be allowed to reenter the vehicle. *Compare Long*, 463 U.S. 1032, 1050-51 (Long posed a danger to police because he was not under arrest and would reenter his vehicle).

Although technically the *Thomas* definition of occupant does expand the *Belton* rule because the arrestee does not have to be stopped by the police or removed from the vehicle, the rule is nevertheless reasonably and logically related to the legitimate need to protect the lives of police officers. The "contact" rule allows the search of the automobile if the officer initiates contact while the arrestee is still inside the vehicle. This makes sense because an officer places himself in danger at the moment he initiates contact with a subject – commencing the

confrontation with the subject and placing himself in proximity to the subject. Therefore, the rule is logically related to one of the justifications underlying the right to search incident to arrest. Because contact is a pivotal act which should trigger the need for a search for weapons, lack of contact should not trigger *Belton*. *See Knowles*, 525 U.S. at 117, 119 (lack of custodial arrest does not trigger *Belton*).

Similarly, an automatic search, without regard to *Chimel* principles, of a non-occupant's vehicle cannot be justified, as the petitioner claims, by the need to secure destructible evidence. First, as explained above, because the person is outside of the automobile at the time of his arrest, he has a severely diminished ability to grab, hide, or destroy evidence inside it.

A more cogent reason the search is not justified, however, is that the search incident to arrest doctrine was meant to curtail an arrestee's ability to conceal or destroy evidence of the crime itself during and after the arrest, it is not meant to curtail the ability of a motorist (or passenger) in a motor vehicle to hide evidence before the arrest occurs. *See Chimel*, at 763 (The area surrounding the arrestee which may be searched is limited to the "area from within which he might gain possession of a weapon or destructible evidence."). *Belton*, 453 U.S. at 465.

The two historical rationales for the "search incident to arrest exception are: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles*, 525 U.S. at 116. The right to search pursuant to arrest is explained in *United States v. Robinson*, 414 U.S. 218 (1973):

> The right without a search warrant contemporaneously to search persons lawfully arrested *while committing crime* and to search the place where the arrest is made in order to find and seize *things connected with the crime* as fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

Robinson at 225 (emphasis added), quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925) (A search of the place where an arrest takes place may be made "in order to find and seize things connected with the crime as its fruits or as the means by which it is committed."); *See also, Preston v. United States*, 376 U.S. 364 (1964) ("The rule allowing contemporaneous searches is justified by the need to . . . prevent the destruction of evidence of the crime.").

When a driver is arrested outside of his car for driving on a suspended license, or on a warrant for an offense unrelated to the car as in this case, it is not logical to conclude that there would be any destructible evidence related to the offense inside the vehicle. In writing for the Court in *Knowles*, Chief Justice Rhenquist observed, "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Knowles* at 118.

Even though evidence of unrelated crimes inadvertently found during a valid search pursuant to arrest are admissible against the arrestee, the rationale supporting

the exception is the assumption that there may be evidence of the crime *for which the suspect has been arrested* on his person or within his immediate control. The supporting rationale is not the unfounded hope that evidence of unrelated and undisclosed crimes might be found if an officer is allowed unfettered access to an arrestee's belongings. "[T]he mere ability of a citizen to put evidence out of the reach of law enforcement by placing it within an area protected by the right to privacy is not sufficient to justify a warrantless search." *Glasco*, 513 S.E.2d at 145 (Lacy, J., concurring).

Courts which condone the search of non-occupants' vehicles base their decisions on the perceived need to seize evidence unrelated to the crime for which the arrest is effectuated. For example, in *State v. Wanzek*, 598 N.W.2d 811 (N.D. 1999), the officer pursued Wanzek because he knew her license was suspended. A search of the vehicle revealed marihuana in the glove box. The court rejected the *Hudgins* "contact" requirement reasoning:

> By drawing a distinction between an occupant and a recent occupant of a vehicle, we would encourage individuals to avoid lawful searches of their vehicles as officers approached. . . . Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search. . . . If *Belton* is read to preclude searches where police contact occurs after the suspect exits the vehicle, suspects could conceal evidence and weapons by merely stepping outside the vehicle whenever they saw an officer approaching.

Id. at 815 (citations omitted). In *Glasco*, 513 S.E.2d 137, the court declined to adopt the "contact" requirement for the stated reason that:

> . . . a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact. That suspect could also conceal evidence in the vehicle and effectively prevent an officer from discovering it by getting out of his or her automobile.

Other courts have erected their conclusions on the identical faulty logic. *See, e.g., People v. Bosnak*, 633 N.E.2d 1322, 1326 (Ill. Ct. App. 1994) ("An occupant of an automobile often will have a ready opportunity to destroy or conceal evidence within the passenger compartment before exiting it."); *People v. Savedra*, 907 P.2d 596, 599, 600 (Colo. 1995) ("Prior to police contact, one of the occupants could have chosen to hide something in the vehicle to avoid discovery by the police.").

These statements do not show concern for the officer's safety or with the preservation of evidence relating to the arrest itself *during the arrest*. The language demonstrates a concern that an officer will lose the ability to rummage around in the arrestee's vehicle without a warrant or probable cause looking for evidence of some other (as yet undetected) crime that might have been concealed or destroyed prior to the arrest before the officer made contact.[15]

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[15] As eloquently stated in a dissenting opinion written by Justice Stevens, "The ascendancy of the warrant requirement in our system of justice must not be bullied aside by extravagant claims of necessity. . . . " *California v. Carney*, 471 U.S. 386, 401 (1985).

Again, since initiation of contact is the pivotal event that begins the arrest process, it is reasonable to prevent the destruction of evidence from that point forward. The petitioner's argument missed the fact that the contact rule adopted in *Thomas* would prevent the successful concealment of evidence after contact has been made because it allows an officer to search for that concealed evidence of other crimes as long as he has made contact with the subject while he or she is still in the car.

F. The search of the car Mr. Thomas was driving was not reasonable under the circumstances of this case.

In order to uphold the search in this case, this Court will have to expand the *Belton* exception to the warrant requirement to allow the search incident to arrest of a vehicle somehow linked to a defendant for the purpose of uncovering evidence of an undetected crime which may have been concealed prior to the officer's initiating contact with the defendant. Such an exception would not be reasonable.

Citizens have a reasonable expectation of privacy while in their vehicles. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).[16] It is a cardinal principle of Fourth Amendment jurisprudence that exceptions to the warrant

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[16] Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day travelling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

requirement must be "jealously and carefully drawn." *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Furthermore, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The touchstone of the Court's analysis under the Fourth Amendment is always the reasonableness of the particular governmental invasion of a citizen's personal security. *See Mimms*, 434 U.S. at 108-109.

Even if this Court were willing to adopt some kind of rule allowing the search of an arrestee's motor vehicle because he is a "recent occupant" *per se*, the particular search in this case has to be shown to be reasonable. This the petitioner cannot do. Detective Maney was sitting in his car in front of a residence when Mr. Thomas pulled up and parked in the driveway. Mr. Thomas got out of the car, closed the door and walked to the rear of the vehicle. Maney approached Mr. Thomas and the two met somewhere near the trunk on the passenger side. (JA-118) Although Maney wanted to keep Mr. Thomas from interrupting the arrest of the residents of the house, Maney admitted that Mr. Thomas had not done anything wrong, and that he had no reason to detain him and demand identification. (JA-116)

> Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Prouse, 440 U.S. at 662-663.

In this case there was no connection between the arrest and the operation of the vehicle. Maney was not pursuing Mr. Thomas, Mr. Thomas just happened to be visiting the house and Maney just happened to be parked in front of it. The officer did not have probable cause to arrest Mr. Thomas while he was in the vehicle. Maney did not have reasonable suspicion for a *Terry*-type[17] stop, and for that reason, Mr. Thomas was not "subject to seizure" while he was in the vehicle. *See United States v. Sokolow*, 490 U.S. 1 (1989); *Illinois v. Gates*, 462 U.S. 213 (1983). This was a consensual encounter that uncovered a warrant for probation violation – an offense not related to the operation of the motor vehicle.

Mr. Thomas was polite and cooperative. He gave the officer identification even though not compelled to do so. There is no evidence that Maney thought Mr. Thomas presented a danger to him. No other individuals were in the car with Mr. Thomas, and there is no evidence that anyone else was outside the residence during the encounter.[18] A search of Mr. Thomas' person produced no weapons or contraband. Maney handcuffed Mr. Thomas and took him inside the house before he conducted the

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[17] *Terry v. Ohio*, 392 U.S. 1 (1968).

[18] The Petitioner claims in a footnote that "[i]t is conceivable that, given the right circumstances, one of these nearby 'confederates' might have been able to access the contents of the vehicle Thomas was driving." Petitioner's Brief at 10, n.4. However, the record shows Mrs. Crall had been handcuffed and was inside the residence. (JA-54) There is no evidence which would lead to the conclusion that anyone other than Maney and Mr. Thomas were outside the residence during this encounter.

search. Mr. Thomas never re-entered the car. Although the record does not reveal whether or not the door was locked, the car door was closed. (JA-118)

Maney did not have independent probable cause to believe he would find contraband in the car. *Thomas*, 761 So.2d at 1010; (JA-136). At the time of arrest, it was improbable that there would be any evidence related to a violation of probation in the automobile. *See Knowles*, 525 U.S. at 118-19 (1998). Also, the possibility that Mr. Thomas would destroy evidence of any undetected crime was remote. As the trial judge tersely stated, "the officer did not have probable cause for a warrantless search of the car. There was no valid need or reason to search the vehicle as an incident to this valid arrest." (JA-12)

Because the holding in *Belton* does not extend to the facts of this case and because the search of the vehicle in this case was unreasonable, the opinion of the Florida Supreme Court should be affirmed. To allow the automatic search of a car even though the arrestee is outside of the car at the time the officer decides to initiate contact would sever the *Belton* rule from its roots in the Fourth Amendment and give an officer unfettered authority to search a vehicle simply because someone connected with, or later linked to, that vehicle has been arrested. Such authority is more of an arrest penalty than it is a legitimate search incident to arrest. In addition, determining whether or not an individual is sufficiently connected to the vehicle at the time of arrest to allow a search will require officers in the field to make a spatial and temporal determination on a case-by-case basis during the arrest and destroy the simplicity *Belton* sought to create.

CONCLUSION

The decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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Case No. 00-391

In The
Supreme Court Of The United States

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF OF THE PETITIONER

In Thomas v. State, 761 So. 2d 1010 (Fla. 1999), the Florida Supreme Court opined that the holding of this Court in New York v. Belton, 453 U.S. 454 (1981), should be conditioned on the arrestee being physically situated in a vehicle when contact between the police and the arrestee is initiated by the police. The addition of that condition to a valid search incident to an arrest of a recent occupant[1] of a vehicle is contraindicated by Belton and by the line of cases, both federal and state, which sanction a Belton search under the factual circumstances similar to those presented *sub judice*. Thus, petitioner submits that Belton applies regardless of the **reason** that the arrestee exits his vehicle and regardless of whether the police initiate contact with the arrestee before he exits the vehicle. The contrary view would require an officer to divine the arrestee's subjective perceptions as to what provoked his exit from the vehicle. The resultant blurring of the Belton bright-line rule would not foster the desired easily-discernible standard of police conduct to guide actions in the field.

It is eminently reasonable for a police officer to conduct a contemporaneous search of a recent occupant's vehicle where that person has been **arrested**. The facts herein concern an arrest scenario, and Respondent acknowledges that an officer is placed in danger at the moment he initiates contact with a

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[1] In their briefs, respondent and *amicus* in support of respondent [hereinafter NACDL] focus much attention on petitioner's use of the term "recent occupant" and attempt to stretch that term to its limits. They fail to acknowledge, however, that respondent Thomas in the instant case was a "recent" occupant in that he had just exited his vehicle when approached by Detective Maney and, therefore, could not be characterized as an "occupant." The attention devoted to the term "recent occupant" by respondent and the NACDL demonstrates concern for something more akin to the contemporaneous requirement of a valid search incident to an arrest rather than to the question presented at bar, i.e., whether the Florida Supreme Court improperly determined that the Fourth Amendment requires a Belton search be conditioned on the police initiating contact with the arrestee while the arrestee is still in his vehicle.

subject (Brief of Respondent at p. 31). Since that contact can occur, as in the instant case, after a subject has already exited the vehicle without yet perceiving the police presence, concern for officer safety is not diminished merely because contact is established subsequent to the subject's voluntary exit from a vehicle. The officer's concerns for safety exist regardless of the reason the arrestee exited a vehicle.

Recognition of the volatility of the arrest scenario likely explains the nearly universal acceptance of the validity of a Belton search where the arrestee has already been removed from the immediate vicinity. Indeed, as recognized by NACDL in its brief at pp. 9-10, Belton searches can, and by practical necessity invariably do, take place after the suspect is outside of the car. NACDL further acknowledges that Belton itself holds that "it is true that 'an individual need not be inside the vehicle at the time of the arrest for Belton to authorize a search of the car incident to the arrest.'" Brief of NACDL at p. 17, citing U.S. Brief at p. 12. These recognitions serve to dispel reliance upon the Chimel[2] line of cases which require confinement of a search of a vehicle incident to arrest to the area within the arrestee's ability to lunge and grab. Because it is a given that Belton applies once the arrestee is out of the vehicle (and, indeed, where the arrestee is most often restrained), the question remains as to why it should make any difference whether the police initiate contact with the arrestee while he is still in his vehicle. The answer of course is that it does not make a difference *because it is the act of arrest, and not where the arrestee is situated*, which justifies the search.

Further, Respondent asserts Belton should not apply in this case for the reason that Thomas got out of the car before Detective Maney could meet him.[3] Once Thomas was placed under custodial arrest outside of the vehicle, as was Roger

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[2] Chimel v. California, 395 U.S. 752 (1969)

[3] Respondent's assertion highlights the validity of the Supreme Court of North Dakota's concern that "police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search." State v. Wanzek, 598 N.W.2d 811, 815 (N.D. 1999).

Belton, the same concerns justifying the Belton search exist – the threat to officer safety and destructible evidence. Hence, the applicability of Belton should not be dependent on the reason Thomas exited his vehicle or whether first contact was initiated by the police. When Thomas arrived at a residence where drug-related arrests were being made, the warrant for his arrest already existed and did so regardless of where Thomas was situated at the time the warrant was discovered by the police. Yet, because the officer was unable to confront Thomas before he exited the vehicle, it is now contended by respondent that a search of the vehicle incident to a valid arrest is impermissible. The considerations supporting Belton's bright-line rule are squarely implicated when the police suddenly discover they are dealing with a person for whom an arrest warrant is outstanding; the dangerous and volatile situation arising when one is arrested exists whether or not the arrestee voluntarily exits a vehicle before initiation of contact with the police.

Respondent seems to suggest the need for some sort of nexus between the arrest and "evidence of the crime itself" (Brief of Respondent at p. 32) or a "connection between the arrest and the operation of the vehicle" (Brief of Respondent at p. 38). Relying upon this Court's opinion in Knowles v. Iowa, 525 U.S. 113 (1998), Respondent asserts that "it was improbable that there would be any evidence related to a violation of probation in the automobile." Brief of Respondent at p. 39.[4] There is no requirement that there be any sort of nexus in order to conduct a valid search incident to an arrest. For example, in United States v. Schecter, 717 F.2d 864, 868 (3rd Cir. 1983), the court disavowed the need to premise a Belton search on the existence of any nexus:

> The district court held incorrectly that the search was illegal because there was no nexus "between the item to be seized and criminal behavior." (footnote and citation omitted) This nexus, however, has never been required to justify an auto search incident to a lawful

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[4] As was asserted in petitioner's initial brief, reliance upon Knowles is misplaced where there was no arrest made in that case but rather the mere issuance of a traffic citation.

> arrest. Under New York v. Belton, supra, such a search is permissible whenever it is made in conjunction with and contemporaneous to a lawful arrest of the auto's occupants.

In a similar vein, both briefs supporting respondent seem to suggest that a search conducted under the factual circumstances occurring herein must not be "exploratory" (Brief of Respondent at p. 29) or "suspicionless" (Brief of NACDL at p. 24). These assertions appear to improperly equate a nexus requirement with the need for probable cause. The court in Schecter spurned this suggestion and determined that "a showing of probable cause is not required to justify the search of an auto's passenger compartment when the search is incident to a lawful arrest." Schecter, 717 F.2d at 868 n.5.

Both briefs supporting respondent exhibit an attempt to focus this case on the definition of "recent occupant." The instant case presents factors similar to Belton, i.e., arrest of a subject who had just exited a vehicle, *but for the arrestee voluntarily exiting a vehicle rather than at the direction of the police.* In the factual context of this case there can be no question but that Thomas was a "recent occupant," even under the most restrictive interpretation of that term, where he was seen exiting his vehicle by Detective Maney immediately before the contact between the two. This case does not present the temporal or spatial relationship questions which may arise under different facts. Here, Thomas was in approximately the same physical spot as was Roger Belton when he was arrested, and, as in Belton, the search in this case was plainly contemporaneous with the arrest of Thomas.[5] The same concerns for officer safety and preservation of evidence are present under the facts of both cases.

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[5] Indeed, neither respondent nor the NACDL argue that the search conducted herein was anything but contemporaneous with Thomas' arrest.

Both respondent to a lesser extent (see, e.g., Brief of Respondent at p. 20[6]), and the NACDL as the centerpiece of its argument, rely on the notion that a suspect must be subject to seizure while still in a vehicle in order to conduct a subsequent valid Belton search. The NACDL, in fact, proposes a new rule whereby Belton's bright-line rule should be restricted to cases where a suspect is seized or is subject to seizure while an occupant of a vehicle. Brief of NACDL at pp. 25-30. This proposal is apparently offered because the NACDL, while supporting the judgment of the Florida Supreme Court in Thomas v. State, 761 So. 2d 1010 (Fla. 1999), does not support the rationale of that court, hence the purported need for a new rule. There are various reasons why a new rule is not needed, the most significant being that Belton works just fine and is ingrained in routine police procedures. Rather than crafting a new rule[7], it is sufficient that Belton not be rendered inapplicable merely because the arrestee voluntarily and without provocation by the police exits a vehicle. Focusing on the instant case, under the NACDL's test Thomas would have been subject to having the vehicle searched had Detective Maney been more fleet of foot so as to have been able to ask Thomas for his licence while Thomas was still an "occupant." The same justification for the search exists regardless of the fact that Thomas had just stepped from his vehicle prior to initiation of contact by Detective Maney.

Lastly, respondent and the NACDL suggest that petitioner's and its *amicus*' citation of the relevant footnotes in Michigan v. Long, 463 U.S. 1032, 1035 n.1, 1049 n.14

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[6] "However, it is clear that Long, unlike the respondent, would have been *subject to seizure* for driving erratically and speeding while still in his car." (emphasis supplied)

[7] To the extent that the NACDL criticizes the State of Florida and the United States for failing to propose a new rule or test, suffice it to say that petitioner and the *amicus* supporting petitioner assert that the Belton bright-line rule is a workable rule which should apply regardless of the reason an arrestee exits a vehicle. A new rule is simply not needed where the Belton rule adequately supports the rationale for conducting a search of a vehicle incident to an arrest, namely officer safety and preservation of evidence.

(1983), is a declaration that "this Court has already decided the issue preserved in this case." Brief of NACDL at p. 22. We recognize that the footnotes are dicta but submit that the reasoning set forth in those footnotes has been adopted and followed by numerous courts as set forth in petitioner's initial brief. Those cases which permit a Belton search where the contact is initiated after the arrestee has voluntarily exited a vehicle are the better reasoned cases which promote the ability of the policeman in the field to better protect himself.

CONCLUSION

Based on the foregoing, and for the reasons set forth in the initial briefs supporting petitioner, the petitioner respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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No. 00-391

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

ROBERT A. THOMAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant, when the arrestee exited the vehicle voluntarily rather than upon the direction of the officer.

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INTEREST OF THE UNITED STATES

This case presents the question whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant, when the arrestee exited the vehicle voluntarily rather than upon the direction of the officer. The Court's resolution of that question will affect the practices of federal law enforcement agents in the commonly recurring situation in which the recent occupant of a vehicle is arrested. In addition, the disposition of this case will affect the admissibility in federal prosecutions of evidence obtained by federal, state, or local police officers as the result of the search of an automobile incident to the arrest of an individual who has recently occupied the vehicle.

STATEMENT

On the evening of February 28, 1997, Police Officer J.D. Maney of the Polk County, Florida Sheriff's Office and his partner drove to a residence in Lakeland, Florida, on information that marijuana was being sold there. The officers obtained consent to search the home and found marijuana. Other detectives arrived and Officer Maney returned to his patrol car outside the residence. As Officer Maney was sitting in his car, he saw respondent drive up to the house, park in the driveway, and exit his car. Officer Maney got out of his patrol car and met respondent at the rear passenger side of respondent's car. Officer Maney asked respondent for his name and for permission to see his driver's license. A routine check of the license revealed an outstanding warrant for a probation violation. Officer Maney arrested respondent, handcuffed him, and brought him into the house. Officer Maney then returned to respondent's car, searched the passenger compartment, and found methamphetamine in the driver's side door and glove compartment. Five minutes elapsed between the time respondent exited his car and was arrested and Officer Maney searched the car. Pet. App. A3, A16; J.A. 4, 7, 10-11, 115-118.

Respondent was charged with possession of methamphetamine and related narcotics offenses. Before trial, he moved to suppress the evidence seized during the search of his car on the ground that the search was illegal. The trial court granted that motion. Pet. App. A17; J.A. 128-129. The Second District Court of Appeal reversed, holding that the search was valid under *New York* v. *Belton*, 453 U.S. 454 (1981). Pet. App. A15-A19. In *Belton*, this Court held "that when a policeman has made a lawful custodial arrest of the occupant of an

automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (footnotes omitted). The court of appeal reasoned that "the occupant of a vehicle cannot avoid the consequence of the *Belton* rule merely by stepping outside the automobile as officers approach." Pet. App. A17. Thus, according to the court, as long as the arrest is not "a preplanned pretext to conduct a warrantless search of the driver, * * * the bright-line test in *Belton* applies." *Id.* at A19.

The Supreme Court of Florida quashed the decision of the court of appeal. Pet. App. A2-A12. The court recognized that *Belton* applies when the arrestee "has been removed from or has exited the automobile." *Id.* at A10. But the court drew a "distinction" between "arrests initiated by the conduct of an officer" and instances "when an individual voluntarily exits his car without provocation from law enforcement personnel and without knowledge of their presence." *Id.* at A4. In the court's view, "*Belton*'s bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant." *Id.* at A10. "[W]here the first contact the defendant has with the officer occurs after exiting the vehicle," the court believed, *Belton* is inapplicable. *Id.* at A8. Applying that test here, the court held that "*Belton* does not apply," because "[respondent] did not exit the vehicle upon the direction of the law enforcement officer." *Id.* at A10. The court remanded for consideration of whether the search was justified under *Chimel* v. *California*, 395 U.S. 752 (1969), and, in particular, findings as to "whether Officer Maney's safety was endangered or whether the preservation of the evidence was in jeopardy." Pet. App. A10.

Then-Justice Wells dissented from the court's application of *Belton*. Pet. App. A11-A12. As he explained, "*Belton* does not add as a condition 'where the law enforcement officer initiates contact with the defendant.'" *Id.* at A11. "The reason for [*Belton*'s] bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest." *Id.* at A11-A12. Justice Wells nevertheless concurred in the judgment based on his view that, under this Court's decision in *Knowles* v. *Iowa*, 525 U.S. 113 (1998), respondent's arrest was not sufficiently "related to the vehicle" to justify the search of the car. Pet. App. A11.

This Court granted certiorari. 121 S. Ct. 755 (2001).[1]

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[1] In opposing certiorari, respondent argued that this Court lacks jurisdiction, because the Florida Supreme Court's decision "is not a final decision as required by 28 U.S.C. § 1257(a)." Br. in Opp. 4. This Court, however, has exercised jurisdiction under Section 1257 over the interlocutory rulings of state courts of last resort, when the State might be prevented from raising the federal question presented to this Court at a later date, even if the State were to prevail on remand. See, *e.g.*, *New York* v. *Quarles*, 467 U.S. 649, 651 n.1 (1984); *Michigan* v. *Tyler*, 436 U.S. 499, 504 (1978). If the State were to prevail on remand in this case, the State would be unable to obtain review in this Court of the Florida Supreme Court's ruling limiting the application of *Belton*, and that federal question would be lost. See also Robert L. Stern et al., *Supreme Court Practice* § 3.8 at 110 (7th ed. 1993) ("[A]n immediate appeal may be available under § 1257 if an important federal issue may entirely escape Supreme Court review as a result of the remand order.") (citing cases). In addition, the remand is limited to a federal question, *i.e.*, whether the search is valid under a *Chimel* analysis. Pet. App. A10. As a result, the remand would not permit the state courts to decide the suppression motion on a

SUMMARY OF ARGUMENT

In *New York* v. *Belton*, 453 U.S. 454 (1981), this Court adopted a bright-line rule to guide the officer in the field in confronting the commonly recurring situation in which the recent occupant of an automobile is arrested. The Court held that police officers may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's occupant. The Florida Supreme Court's decision in this case limits the application of *Belton* to circumstances in which the arrestee exits a vehicle at the direction of law enforcement personnel. That limitation finds no support in precedent or principle, and should be rejected.

The *Belton* rule is grounded on the historic rationales underlying the search-incident-to-arrest doctrine—the need to protect officer safety and to preserve evidence of a crime. As this Court has long recognized, the need to disarm suspects and protect evidence makes it reasonable for police officers to search the person of the arrestee and the area within his immediate control. *E.g.*, *Chimel* v. *California*, 395 U.S. 752 (1969). In *Belton*, this Court adopted the "generalization" that the passenger compartment of an automobile is "generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]," when "the arrestee is [the car's] recent occupant." 453 U.S. at 460 (internal quotation marks omitted). That generalization enabled the Court to "establish the workable rule [that] this category of cases requires." *Ibid.*

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state law ground that would moot the *Belton* issue raised here. Compare *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 82 (1997).

The rationales underlying *Belton* are implicated "whenever officers effect a custodial arrest" of the recent occupant of a vehicle. *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983). As this Court has recognized, the custodial arrest is a volatile and dangerous event, increasing the risk to the officer that a suspect will grab for a weapon and the likelihood that he will attempt to conceal or destroy evidence of his guilt. *E.g.*, *Knowles* v. *Iowa*, 525 U.S. 113 (1998). In the *Belton* context, those concerns justify the search of a vehicle recently occupied by an arrestee, without regard to whether the arrestee was ordered out of the car by police or voluntarily exited the car oblivious to police. The fact of the arrest, and not the reason that the arrestee exited the car, justifies the *Belton* search.

The Florida Supreme Court's decision not only has no footing in the rationales of *Belton*, but it needlessly blurs the bright line drawn by *Belton*. In *Belton*, this Court recognized that it was essential to provide the officer in the field with a "single familiar standard" to determine when a vehicle search is authorized incident to an arrest. 453 U.S. at 458 (internal quotation marks omitted). The Florida decision undermines that salutary objective by requiring officers to undertake an ad hoc, case-by-case inquiry into the reason that an arrestee exited his vehicle in order to decide whether a search of the passenger compartment is authorized. That inquiry invites the same sort of uncertainty from the standpoint of the officer in the field and disarray in results that this Court sought to foreclose in *Belton*.

The search of respondent's vehicle was valid under a proper application of *Belton*. Respondent was a "recent occupant" of the car; he was subjected to a "lawful custodial arrest" while standing next to the car; and the search of respondent's car was conducted as "a con-

temporaneous incident of that arrest." *Belton*, 453 U.S. at 460. Accordingly, the challenged search was a reasonable and thus lawful intrusion under the Fourth Amendment.

ARGUMENT

A SEARCH OF THE PASSENGER COMPARTMENT OF AN AUTOMOBILE IS JUSTIFIED AS A CONTEMPORANEOUS INCIDENT OF THE LAWFUL CUSTODIAL ARREST OF THE VEHICLE'S RECENT OCCUPANT, WITHOUT REGARD TO THE REASON THAT THE INDIVIDUAL EXITED THE VEHICLE

A. Under *New York* v. *Belton*, Police Officers May Search The Passenger Compartment Of A Car Incident To The Lawful Custodial Arrest Of Any "Recent Occupant" Of The Vehicle

1. The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. This Court has long recognized that when there has been a lawful arrest, a search of the person of the arrestee and area within his control "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); see *Weeks* v. *United States*, 232 U.S. 383, 392 (1914).[2] There are two

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[2] Another "circumstance[] in which the Constitution does not require a search warrant is when the police stop an automobile on the street or highway because they have probable cause to believe it contains contraband or evidence of a crime." *Arkansas* v. *Sanders*, 442 U.S. 753, 760 (1979) (citing cases). See also, *e.g.*,

longstanding rationales for the search-incident-to-arrest doctrine: the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape," and the need to prevent the "concealment or destruction" of evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969); see *Knowles* v. *Iowa*, 525 U.S. 113, 116-117 (1998) (citing cases).

As this Court has recognized, the custodial arrest is a volatile and dangerous event. See *Knowles*, 525 U.S. at 117; *Robinson*, 414 U.S. at 234-235 & n.5. Between 1989 and 1998, for example, 239 of the 682 law enforcement officers who were feloniously killed in the line of duty were slain in arrest situations, making the arrest by far the most dangerous situation that officers commonly confronted during that period. U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 30 (1998) (*Uniform Crime Reports*). In 1998 alone, 16 of the 61 law enforcement officers killed in the line of duty were engaged in arrest situations when they were mortally wounded, and in that same year officers were assaulted while attempting arrests on 10,997 occasions. *Id.* at 29, 86. See also U.S. Dep't of Justice, Federal Bureau of Investigation, *Killed in the Line of Duty: A Study of Felonious Killings of Law Enforcement Officers* 3 (Sept. 1992).[3] Similarly, the moment an

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Maryland v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Pennsylvania* v. *Labron*, 518 U.S. 938, 940 (1996) (per curiam). The "automobile exception" is not applicable in this case, however, because in justifying the challenged search the State has relied upon the fact of respondent's arrest, and not upon any probable cause that Officer Maney may have had to believe that respondent's car contained contraband or evidence of a crime.

[3] Drug-related arrests pose a particularly high risk to police officers. In 1998, for example, seven of the 16 officers who were

individual is placed under formal arrest, he has an increased motive "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973).

Accordingly, this Court has recognized that, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape," and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel*, 395 U.S. at 762-763. Further, the officer's need to protect himself and to preserve evidence justifies a search of the area within the arrestee's "immediate control," which the Court has defined as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 763. Because "potential dangers lurk[] in all custodial arrests," *United States* v. *Chadwick*, 433 U.S. 1, 14-15 (1977), the validity of a search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Robinson*, 414 U.S. at 235. Rather, "[i]t is the fact of the lawful arrest which establishes the authority to search." *Ibid.*

2. In *New York* v. *Belton*, 453 U.S. 454 (1981), this Court applied those principles to define the permissible scope of a search incident to the arrest of the occupant of an automobile. The *Belton* case arose when a New York state trooper stopped a car for speeding and

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slain in arrest situations were investigating drug-related matters. *Uniform Crime Reports* at 29; see *id.* at 30 (between 1989 and 1998, 40 of the 239 officers feloniously killed in arrest situations were investigating drug-related matters).

thereafter developed probable cause to arrest the occupants of the vehicle for possession of marijuana. The officer ordered the occupants out of the car and placed them under arrest. See *id.* at 455-456. After "patt[ing] down" the arrestees and separating them, the officer searched the passenger compartment of the car and discovered cocaine in the zippered pocket of a jacket that was lying on the back seat. See *id.* at 456. The state courts suppressed the evidence found during the vehicle search on the ground that, when the search took place, "there [was] no longer any danger that the arrestee or a confederate might gain access to the article." *Ibid.* (internal quotation marks omitted). This Court reversed.

The Court began its Fourth Amendment analysis with the principle that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *Belton*, 454 U.S. at 457. The Court then explained that courts had struggled in applying the search-incident-to-arrest doctrine to the recurring question presented in *Belton*, namely, "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile *after the arrestees are no longer in it.*" *Id.* at 459 (emphasis added). A review of the case law illustrated that the lower courts had "found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460. As a result, police officers were left without "a settled principle" to establish the "scope of [their] authority" in this "problematic context." *Id.* at 459-460 & n.3.

The Court admonished that "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." 453 U.S. at 458 (internal quotation marks omitted). "[T]o establish the workable rule [that] this category of cases requires," the Court adopted "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763). And, based on that generalization, the Court held that whenever "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnotes omitted).

In so holding, the Court emphasized that this rule, "'while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found.'" 453 U.S. at 461 (quoting *Robinson*, 414 U.S. at 235). Just as is true with respect to the search of the person of the arrestee, if the arrest is lawful, then the "'search [of the vehicle] incident to the arrest requires no additional justification.'" *Ibid.*[4]

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[4] As Justice Powell explained in his opinion concurring in the judgment of *Robbins* v. *California*, 453 U.S. 420 (1981), which was decided the same day as *Belton*, the *Belton* rule is also supported by the diminished expectation of privacy that an individual has in the circumstances giving rise to its application:

3. As is clear from the facts of *Belton* itself, an individual need not be inside the vehicle at the time of the arrest for *Belton* to authorize a search of the car incident to the arrest. *Belton* applies as long as the arrestee is a "recent occupant" of the vehicle, as was true in the case of Roger Belton himself. 453 U.S. at 460; see *id.* at 462-463 ("[Belton]'s jacket was located inside the passenger compartment of the car in which the respondent had been a passenger *just before he was arrested.*") (emphasis added); 3 Wayne R. LaFave, *Search and Seizure*, § 7.1(b) at 437 & n.26 (3d ed. 1996 & Supp. 2001) ("*Belton* applies whenever the person arrested was * * * the driver of or a passenger in the vehicle just before the arrest.") (collecting cases). Justice Brennan underscored that dimension of *Belton* in his dissent. See 453 U.S. at 463 (The Court's "'bright-line' rule [is] applicable to 'recent' occupants

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> *Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence. The balance of these interests strongly favors the Court's rule. The occupants of an automobile enjoy only a limited expectation of privacy in the interior of the automobile itself. This limited interest is diminished further when the occupants are placed under custodial arrest.

Id. at 431 (citations omitted). Cf. *United States* v. *Edwards*, 415 U.S. 800, 808-809 (1974) ("While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."). An individual's expectation of privacy in the vehicle he was occupying immediately before an arrest is further diminished by the fact that the Fourth Amendment permits police to inventory the contents of impounded vehicles under standardized procedures at a time and place removed from an arrest. See *Colorado* v. *Bertine*, 479 U.S. 367, 371-372 (1987); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

of automobiles."). And the Florida Supreme Court acknowledged it in this case. See Pet. App. A9 ("[T]his Court is mindful that the arrest and subsequent search should not be invalidated merely because the defendant is outside the vehicle.").

As a practical matter, that is the only rule that makes sense. The vast majority of arrests that take place in the *Belton* context occur "after the arrestees are no longer in [the car]." *Belton*, 453 U.S. at 459. See Pet. App. A19 ("We can think of few incidents where a driver will not be out of the vehicle when an arrest is made."). Sound police practice explains why that is so. As this Court has recognized, police officers face an "inordinate risk" when "approach[ing] a person seated in an automobile" and, as a result, officers often order occupants out of the car when conducting an investigation that may lead to an arrest. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (officer may, without particularized justification, order a driver out of the car after a stop of the vehicle); see also *Maryland* v. *Wilson*, 519 U.S. 408, 414 (1997) (rule of *Mimms* extends to passengers). Moreover, whenever the occupant or recent occupant of a vehicle is arrested, it will invariably be more dangerous and less efficient for an officer to search the vehicle while the arrestee is still in it. See LaFave, *supra*, § 7.1(a) at 435 n.15 (The "fairly standard practice" is to remove the arrestee from the car before the search, "both for reasons of safety and because of the practical physical limitations of effecting an arrest in such a confined area.") (internal quotation marks omitted).

B. The *Belton* Rule Applies Without Regard To Whether The Arrestee Exited The Car Of His Own Volition Or Upon The Direction Of Law Enforcement Personnel

The Florida Supreme Court held that *Belton* does not govern this case because respondent "did not exit the vehicle upon the direction of the law enforcement officer." Pet. App. A10. The court reasoned that "*Belton*'s bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant." *Ibid.* That limitation is unsupported and unsound.

1. *Belton*, along with the search-incident-to-arrest cases on which the Court relied in *Belton*, makes clear that the custodial arrest gives rise to the authority to the search. See *Belton*, 453 U.S. at 461 ("'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'") (quoting *Robinson*, 414 U.S. at 235). See also, *e.g.*, *United States* v. *Edwards*, 415 U.S. at 802-803; *Chimel*, 395 U.S. at 762-763; *Preston* v. *United States*, 376 U.S. at 367. As explained above (pp. 8-9), that conclusion follows from the potential dangers inherent in every custodial arrest. Those dangers arise as soon as an individual is placed under custodial arrest, regardless of whether the individual initially got out of his vehicle voluntarily or upon the direction of police.

This Court's decision in *Michigan* v. *Long*, 463 U.S. 1032 (1983), confirms that *Belton* is not limited to instances in which the arrestee is ordered out of the car by police. In *Long*, police officers observed a car swerve off the road into a shallow ditch. When they stopped to

investigate, the driver of the car, "the only occupant of the automobile, met the deputies at the rear of the car." 463 U.S. at 1035. The officers did not arrest the driver but merely issued him a ticket. The question presented in *Long* was whether the officers lawfully conducted a protective *Terry*-type search of the passenger compartment of the car during the encounter. Before turning to that question, however, the Court observed that "[i]t is clear * * * that if the officers had arrested Long," instead of simply issuing him a ticket, "they could have searched the passenger compartment" under *Belton*. *Id.* at 1035 n.1. As the Court explained, "*Belton* clearly authorizes [an automobile] search *whenever* officers effect a custodial arrest." *Id.* at 1049 n.14 (emphasis added). That was true in *Long* even though the police officers did not initiate contact with the individual until after he had exited his car.

Knowles v. *Iowa*, 525 U.S. 113 (1998), reinforces the conclusion that the custodial arrest is the pivotal event for purposes of applying the *Belton* rule. In that case, the Court considered whether a police officer may conduct a warrantless search of a vehicle when the officer gives the driver a citation in lieu of arresting him. After examining the twin rationales for the search-incident-to-arrest exception—officer safety and preservation of evidence—the Court held that the search was not authorized. The Court explained that "[t]he threat to officer safety from issuing a traffic citation * * * is a good deal less than in the case of a custodial arrest," and that "the concern for destruction or loss of evidence is not present at all" in the case of a citation. *Id.* at 117, 119. At the same time, however, the Court reaffirmed that when, as here, there *is* a "custodial arrest," police officers may "conduct a full search of the passenger compartment" of an automobile in order "to search for

weapons and protect themselves from danger." *Id.* at 117, 118 (citing *Belton*, 453 U.S. at 460).[5]

2. The Florida Supreme Court's ruling that *Belton* is limited to cases in which the arrestee is directed out of his car by law enforcement personnel finds no support in either of the historic rationales underlying the search-incident-to-arrest doctrine.

As this Court has observed, *Belton* "recogni[zes] that part of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity." *Long*, 463 U.S. at 1050 n.14; see *Belton*, 453 U.S. at 457. The likelihood that an arrestee will lunge for a weapon contained in a vehicle that he recently occupied does not fluctuate based on the circumstances under which the arrestee initially got out of the vehicle. As this Court has emphasized, "[t]he danger to the police officer *flows from the fact of the*

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[5] As noted above, Justice Wells concurred in the result reached by the Florida Supreme Court because he believed that *Knowles* "control[s] the specific facts here," since respondent's arrest was not "made related to the vehicle." Pet. App. A11. That analysis is flawed. This case is distinguishable from *Knowles* in a fundamental respect: unlike the defendant in *Knowles*, respondent was subjected to a lawful custodial arrest. The fact that respondent was not arrested for operating the vehicle is of no moment. As this Court has recognized, "[t]he danger to the police officer flows from the fact of the arrest, * * * and not from the grounds for the arrest." *Robinson*, 414 U.S. at 234 n.5. See *United States* v. *Arango*, 879 F.2d 1501, 1505 (7th Cir. 1989) ("It is the threat of arrest or arrest itself which may trigger a violent response—regardless of the nature of the offense which first drew attention to the subject."), cert. denied, 493 U.S. 1069 (1990). Thus, this Court "treat[s] all custodial arrests alike for purposes of search justification." *Robinson*, 414 U.S. at 235.

arrest, and its attendant proximity, stress, and uncertainty." *Robinson*, 414 U.S. at 234 n.5 (emphasis added); see *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."). Thus, regardless of *why* an individual gets out of his car, "the 'bright line' that [this Court] drew in *Belton* clearly authorizes [a search of the car] *whenever* officers effect a custodial arrest." *Long*, 463 U.S. at 1049 n.14 (emphasis added).

The same conclusion follows with respect to the other rationale underlying *Belton*. As this Court has recognized, upon arrest, everyone has an increased motive to conceal or destroy incriminating evidence. See *Belton*, 453 U.S. at 457; *Chimel*, 395 U.S. at 763; see also LaFave, *supra*, § 5.2(c) at 78 ("[A]s of the moment of arrest the arrestee is motivated to conceal, destroy or furtively abandon any incriminating evidence."). The likelihood that an arrestee will attempt to destroy evidence in a car—and the officer's interest in preventing such efforts—does not wax and wane based on whether an arrestee got out of his car of his own volition or upon an officer's bidding. Either way, the arrestee will have the same motive to conceal or destroy incriminating evidence that may be in the car. And, as this Court has stated, the need to preserve the integrity of such evidence following the arrest "justifies an 'automatic' search" under *Belton*. *Long*, 463 U.S. at 1049 n.14. See also *Glasco* v. *Commonwealth*, 513 S.E.2d 137, 142 (Va. 1999) ("[A] knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact.").

In short, whether an individual is oblivious to police when he exits his car or is directed out of the car by police, the likelihood that the individual will attempt to

grab for a weapon or destroy evidence inside the car is a product of the fact that the individual is placed under custodial arrest, and not of his state of mind when he gets out of the car.

3. The Florida Supreme Court's decision needlessly blurs the bright line adopted by *Belton*, and will engender the same sort of uncertainty from the standpoint of the officer in the field and disarray in results that this Court sought to preclude in *Belton*.

In *Belton*, this Court recognized that "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" 453 U.S. at 458 (quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979)). See *Robbins* v. *California*, 453 U.S. at 431 (Powell, J., concurring in judgment) (*Belton* recognizes that "practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence."). At the same time, the Court recognized that the interests protected by the Fourth Amendment would better be served by a rule that, "in most instances, makes it possible [for police officers] to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." 453 U.S. at 458, 459 n.1 (internal quotation marks omitted). See LaFave, *supra*, § 7.1(c) at 445 ("*Belton* is grounded upon the compelling proposition that it is often advantageous to both privacy interests and law enforcement interests if rules of police conduct are stated in terms of easily understood standardized procedures which may be routinely followed.") (footnote omitted).

The "search incident to arrest is by far the most common variety of police search practice." LaFave, *supra*, § 5.2(c) at 77-78. The need for bright-line rules in this frequently recurring situation is as compelling today as it was when *Belton* was decided. And, since *Belton*, the Court has repeatedly reaffirmed the principle that a case-by-case approach to recurring Fourth Amendment issues may fail to "provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment." *Oliver* v. *United States*, 466 U.S. 170, 181 (1984). See also, *e.g.*, *Wyoming* v. *Houghton*, 526 U.S. 295, 305-306 & n.2 (1999); *id.* at 307 (Breyer, J., concurring); *California* v. *Acevedo*, 500 U.S. 565, 576-577 (1991); *Colorado* v. *Bertine*, 479 U.S. 367, 375 (1987); *Illinois* v. *Andreas*, 463 U.S. 765, 772 (1983); *Illinois* v. *Lafayette*, 462 U.S. 640, 648 (1983).

The Florida Supreme Court's decision requires the officer in the field to undertake precisely the sort of indeterminate, case-by-case inquiries that this Court sought to foreclose in *Belton*. Under the Florida decision, the determination whether *Belton* permits the search of an arrestee's car requires the officer to make an individualized determination as to the reason that the arrestee got out of his car. If the officer concludes that the arrestee exited his car because the officer "actually confront[ed]" or "signal[ed] confrontation" with him, or because the arrestee sought to "avoid the consequences of *Belton*," then *Belton* applies and the officer may search the car incident to the arrest. Pet. App. A9-A10. In contrast, if the officer feels that the arrestee "voluntarily exit[ed] his car without provocation from law enforcement personnel and without knowledge of their presence," then *Belton* does not apply and the officer must conduct an analysis of the

Chimel factors—*i.e.*, the threat to the officer's safety and destruction of evidence in the particular case—before resolving whether he may search the car incident to the arrest. *Id.* at A4, A9-A10.

That regime requires law enforcement personnel to make a variety of ad hoc determinations—subject to second-guessing by a court—in the "only limited time" that they have to react to "the specific circumstances they confront" in arresting the recent occupant of a vehicle, further compromising officer safety in this volatile situation. *Belton*, 453 U.S. at 458 (internal quotation marks omitted).[6] The regime will inevitably produce divergent results on similar facts from one officer or case to the next. And the regime accordingly is a far cry from the "workable rule [that] this category of cases requires." *Id.* at 460.

Respondent argues (Br. in Opp. 9-10) that "[w]ithout requiring that the officer confront the arrestee or signal

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[6] For example, in deciding whether a *Belton* search is authorized, officers would have to ascertain (1) whether the arrestee was aware of the police when he got out of the car, a determination that may depend on whether the police are in uniform or a marked squad car, police lights or sirens have been activated, or the arrestee was impaired in a manner that could have affected his awareness of the police; (2) whether, if the arrestee *appeared* to get out of the car voluntarily, the arrestee nevertheless did so to avoid the application of *Belton*, a determination that requires the officer to discern whether an arrestee knew about *Belton*; and (3) whether an officer sufficiently "signal[ed] confrontation" (Pet. App. A10) with an arrestee, such that the arrestee was getting out of the car in response to the officer rather than for another reason. The analysis would be more complicated when an officer confronts a vehicle with more than one occupant, since it is possible that occupants will exit a vehicle for different reasons, which may permit one arrestee, but not another, to challenge a search of the car incident to his arrest.

confrontation [with] the arrestee while he is still in the vehicle, the officer and the court[s] would have a difficult time deciding whether or not the arrestee was a 'recent occupant' of the vehicle." That argument should be rejected. There is no doubt that an individual is the "recent occupant" of a vehicle when, as here, the officer sees the individual get out of the car and contacts him moments later beside the car. That is the situation in which the question presented is most likely to arise and, in deciding this case, the Court need go no further than considering the application of *Belton* in that context (*i.e.*, the one presented here).[7]

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[7] In other contexts, courts have considered whether, or under what circumstances, *Belton* applies when the recent occupant of a vehicle has gone beyond the immediate vicinity of the car before he is arrested. Compare, *e.g.*, *United States* v. *Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (*Belton* does not apply where individual was "approximately thirty feet from his vehicle when arrested," such that "the passenger compartment of the vehicle was not within [his] 'immediate control' at the time of the arrest"); *United States* v. *Fafowora*, 865 F.2d 360, 361, 362 (D.C. Cir.) (*Belton* does not apply where individuals were "one car length away" from vehicle at the time of arrest, such that vehicle "was not within the 'immediate surrounding area' into which [the suspects] might have reached" at time of arrest), cert. denied, 493 U.S. 829 (1989), with *United States* v. *Franco*, 981 F.2d 470, 472 (10th Cir. 1992) (*Belton* applies where individual "was arrested in a Government truck that was parked in close proximity to his vehicle"); *United States* v. *Arango*, 879 F.2d at 1506 (*Belton* applies where individual was arrested "one block" away from car, where search of car was conducted after individual was returned to area near car, because officer "was in need of medical attention" there). Any doubt, however, as to whether *Belton* applies in such outlying cases provides no reason to deny officers the protections afforded by *Belton* in the more typical situation presented here. Cf. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 359-360 (1994); *Albright* v. *Oliver*, 510 U.S. 266, 291 (1994) (Souter, J., concurring in judgment).

4. The Florida Supreme Court's decision could have the harmful unintended consequence of increasing the risks inherent in encounters between police and the recent occupants of vehicles. Although the Florida Supreme Court stated that "occupants of a vehicle cannot avoid the consequences of *Belton* merely by stepping outside of the vehicle as the officers approach," Pet. App. A9-A10, its decision may nevertheless encourage suspects to exit their vehicles before ordered to do so by police in an attempt to render their vehicles "search proof" for purposes of *Belton*. See *Glasco* v. *Commonwealth*, 513 S.E.2d at 142. At the same time, the Florida rule may lead police to more quickly initiate contact with vehicle occupants, in order to ensure that *Belton* will apply in the event of an arrest. See *State* v. *Wanzak*, 598 N.W.2d 811, 815 (N.D. 1999). Either impulse will increase the confrontation, unpredictability, and thus perils posed by *Belton* encounters, creating a more volatile world for the officer in the field than the one that existed before *Belton*.

Furthermore, the Florida decision fails to take into account that in many situations, including undercover operations, it may be undesirable for police to announce their presence and initiate contact with an individual *before* the individual gets out of a vehicle. Cf. *Shipley* v. *California*, 395 U.S. 818, 819 (1969) (per curiam). That may be particularly true where police are on the lookout for a particular suspect, whose identity may not be known or discernable until the suspect exits a vehicle, or where police do not develop suspicion to investigate until an individual gets out of a vehicle, such as where officers observe an individual get out of a car brandishing a firearm or carrying contraband.

C. The Search Of Respondent's Car Was Valid Under *Belton*, Because It Was A Contemporaneous Incident Of Respondent's Lawful Custodial Arrest

1. The search of respondent's vehicle was a valid search incident to respondent's arrest under *Belton*. Respondent was a "recent occupant" of the car. *Belton*, 453 U.S. at 460. Officer Maney saw respondent drive up to the residence, park his car, and get out of the vehicle. Pet. App. A3. Respondent was subjected to a "lawful custodial arrest" only moments after he exited his car, while standing in practically the same spot in which Roger Belton stood during his arrest—"by the side of the car." 453 U.S. at 457, 460 (internal quotation marks omitted). And Officer Maney searched the passenger compartment of respondent's car as "a contemporaneous incident" of respondent's arrest. *Id.* at 460. Only five minutes elapsed between the time respondent exited his car and was arrested and the search occurred. Pet. App. A3.

2. The fact that Officer Maney handcuffed respondent and brought him into the nearby residence before searching the car does not alter that conclusion.[8] By its terms, *Belton* only applies once an individual has been placed under "lawful custodial arrest." 453 U.S. at 460. In effecting such arrests, it is commonplace for police officers to handcuff the arrestee and remove him from the immediate vicinity of the car before conducting a *Belton* search. As numerous courts of appeals have

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[8] Respondent has not argued that *Belton* is inapplicable on the ground that he was restrained before his car was searched, and that issue was not decided by the Florida courts below and is not within the question on which this Court granted certiorari. See Pet. i. In any event, as we explain below, this issue provides no basis for avoiding the application of *Belton* in this case.

recognized, *Belton* does not require law enforcement officers to forego that prudent police practice in order to proceed with a *Belton* search. See *United States* v. *Mitchell*, 82 F.3d 146, 152 (7th Cir.) ("The fact that [the arrestee] had been handcuffed and placed in the police vehicle just prior to the commencement of the search that yielded the firearm does not affect the lawfulness of the search"; "it does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures.") (internal quotation marks omitted), cert. denied, 519 U.S. 856 (1996).[9]

That common-sense conclusion comports with the bright line drawn by *Belton*. In *Belton*, this Court rejected the proposition that, "[w]hen the arrest has been consummated and the arrestee safely taken into

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[9] See also, *e.g.*, *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000) (A "search is valid under *Belton* without regard to the fact that the search occurred after Defendant had been restrained."); *In re Sealed Case*, 153 F.3d 759, 768 n.4 (D.C. Cir. 1998) (*Belton* search may be conducted after arrestee has been handcuffed; collecting cases); *United States* v. *Sholola*, 124 F.3d 803, 817 & n.15 (7th Cir. 1997) (courts have "consistently rejected" the argument that *Belton* is inapplicable when the arrestee has been handcuffed and placed in squad car; collecting cases); *United States* v. *Doward*, 41 F.3d 789, 791 n.1 (1st Cir. 1994) ("[T]he great weight of authority * * * holds that *Belton*'s bright-line rule applies even in cases where the arrestee is under physical restraint and at some distance from the automobile during the search.") (collecting cases), cert. denied, 514 U.S. 1074 (1995); *United States* v. *Lacey*, 86 F.3d 956, 971 (10th Cir.), cert. denied, 519 U.S. 944 (1996); *United States* v. *Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995); *United States* v. *Valiant*, 873 F.2d 205, 206 (8th Cir.), cert. denied, 493 U.S. 837 (1989); *United States* v. *White*, 871 F.2d 41 (6th Cir. 1989); LaFave, *supra*, § 7.1(c) at 448 ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car."); *id.* at 448-449 n.79 (collecting cases).

custody, the justifications [for a warrantless search] cease to apply," because "at that point there is no possibility that the arrestee could reach weapons or contraband." 453 U.S. at 465-466 (Brennan, J., joined by Marshall, J., dissenting). Instead, the Court adopted the "generalization" that weapons or contraband within the passenger compartment of a car are "generally, even if not inevitably, within the area into which an arrestee might reach." *Id.* at 460 (internal quotation marks omitted). That generalization enabled the Court to establish a bright-line rule authorizing automobile searches incident to the arrest of any recent occupant of a car, without regard to the "probability in a particular arrest situation that weapons or evidence would in fact be found [in the car]." *Id.* at 461 (internal quotation marks omitted). And, as even the *Belton* dissenters acknowledged, the obvious import of that rationale is that *Belton* applies even after the arrestee has been handcuffed and moved away from the car. See *id.* at 468 ("Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest.").[10]

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[10] In *Belton*, this Court rejected the argument that the search was invalid "because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pockets, had gained 'exclusive control' of them." 453 U.S. at 462 n.5. As the Court explained, "under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'" *Ibid.* Similarly, an officer should not be barred from searching a vehicle incident to the arrest of its recent occupant just because the officer has apparently seized control over the arrestee by handcuffing him and moving him from the immediate vicinity of the car. Cf. *United States* v. *Brown*, 671 F.2d 585 (D.C. Cir. 1982) (per curiam).

Even after individuals are taken into custody and restrained, they continue to pose a grave threat to law enforcement personnel. See, *e.g.*, *Plakas* v. *Drinski*, 19 F.3d 1143, 1145 (7th Cir.) (suspect handcuffed in back-seat of squad car escaped from squad car and later confronted police), cert. denied, 513 U.S. 820 (1994); *United States* v. *Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir.) (citing incidents in which police officers were slain by handcuffed arrestees), cert. denied, 510 U.S. 955 (1993).[11] The bright-line *Belton* rule permits police officers to protect themselves against the small but nevertheless real risk that an arrestee who has been handcuffed or otherwise restrained will escape from custody by ensuring that, if the arrestee does somehow manage to break free, he will not succeed in retrieving a weapon from a nearby vehicle or in reaching into that vehicle and destroying evidence of a crime.

3. At the same time, there is a limit on how *Belton* searches may be conducted. *Belton* requires that the search of the vehicle be undertaken as "a contemporaneous incident of th[e] arrest." 453 U.S. at 460. Compare, *e.g.*, *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220 (1967) (search of arrestee's car was "too remote in time or place to [be] incidental to the arrest," where

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[11] In 1998, four officers were killed and 6,881 were assaulted while in the process of handling, transporting, or maintaining the custody of prisoners. *Uniform Crime Reports* at 29, 86. In addition, two veteran police officers were killed on the evening of May 19, 1998, when a handcuffed suspect in the back seat of their patrol car managed to free himself, retrieve one of the officer's guns, and mortally wound both officers. *Id.* at 49. Another officer was killed on January 12, 1998, by an individual who had been ordered out of his car, when the individual managed to free himself during a struggle with the officer, retrieve a rifle from his car, and mortally wound the officer. *Id.* at 50.

search did not take place until the arrestee was in custody inside the courthouse and his car had been moved by police from the site of the arrest to the street outside the courthouse); *Preston* v. *United States*, 376 U.S. at 368 (search of arrestee's car was not incident to arrest when search was conducted after the car had been towed from the scene of the arrest to a garage); see also *United States* v. *Chadwick*, 433 U.S. at 15 (search of footlocker was too remote when it was conducted "more than an hour" after arrest); see also *Belton*, 453 U.S. at 461-462 (distinguishing *Chadwick*).

As the District of Columbia Circuit has explained, a search meets the contemporaneous incident standard whenever "it is an integral part of the lawful custodial arrest process." *United States* v. *Abdul-Saboor*, 85 F.3d 664, 668 (1996) (internal quotation marks omitted). Thus, in deciding whether a search incident to arrest is proper, "[t]he relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening events that the latter cannot be fairly be said to have been incident to the former." *Ibid.* Under that approach, the search of respondent's vehicle was plainly conducted as a contemporaneous incident of respondent's arrest, because the search and arrest were part of "one continuous event," *id.* at 669, which began when respondent got out of his car and was arrested and ended just five minutes later when Officer Maney searched the car.

* * * * *

Because the search of respondent's vehicle was conducted as a contemporaneous incident of respondent's lawful custodial arrest, the search is valid under

Belton and, therefore, constitutes a reasonable intrusion within the meaning of the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

— v.—

ROBERT A. THOMAS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE FLORIDA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

STATEMENT OF THE CASE

The facts are not disputed. On the evening of February 28, 1997, respondent Robert Thomas drove a car into the driveway of a home in Lakeland, Florida. Inside the home, police were making arrests for narcotics offenses. Detective J.D. Maney of the Polk County Sheriff's Office was stationed outside the home in a patrol car. Detective Maney observed respondent's car enter the driveway and saw respondent exit his car and walk to the rear of the car. Detective Maney approached respondent and asked to see his driver's license. Maney had no reason to believe that there

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

was any criminal evidence in respondent's vehicle. A check of respondent's license revealed an outstanding warrant for a probation violation. Maney arrested respondent and escorted him inside the residence. Maney then returned to respondent's car and searched it, discovering substances inside the driver's side door and in the glove box that were later identified as illegal narcotics. Five minutes elapsed between the time that respondent had exited his car and Maney's search of the vehicle. JA 20-21,135-36.

The trial court granted respondent's motion to suppress the narcotics found in his car, but the District Court of Appeal, Second District, reversed. JA 130-34. Interpreting *New York v. Belton*, 453 U.S. 454 (1981), the appellate court explained that "a court may not determine on a case-by-case basis whether the interior of an automobile is within the scope of a search incident to arrest." JA at 132. Because there was no evidence that respondent's arrest was a preplanned pretext to conduct a warrantless search of his car, the court ruled that "the bright line test in *Belton* applies" even though respondent was outside his vehicle when arrested. *Id.* at 133. Consequently, the appellate court held that the search of respondent's car was a valid search incident to arrest.

The Florida Supreme Court reversed the District Court of Appeal's ruling. JA 135-45. The court recognized that *Belton* established "a bright-line rule to be applied in all cases" where the occupant of an automobile is arrested. *Id.* at 138. The court concluded, however, that *Belton*'s *per se* rule was inapplicable "when an individual voluntarily exits his car without provocation from [police] and without knowledge of their presence." *Id.* at 137. The court adopted the reasoning of *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995), which explained that a search incident to arrest was valid under *Belton* only "'[w]here the officer initiates contact with the defendant, either by actually confronting the defendant or

by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile.'" JA 141-42, quoting *Hudgins*, 52 F.3d at 119. Thus, the court held that *Belton*'s *per se* rule was confined to "situations where [an] officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant." JA 142-43.

Applying this standard to the facts, the court below ruled that "the record is clear that [respondent] did not exit the vehicle upon the direction" of Detective Maney. JA 143. Hence, *Belton* was inapplicable. The court ordered the trial court to decide whether the search of respondent's car could be upheld as a valid search incident to arrest under *Chimel v. California*, 395 U.S. 752 (1969).

SUMMARY OF ARGUMENT

In *Chimel v. California*, *supra*, and *New York v. Belton*, *supra*, this Court explained that although searches incident to arrest were not subject to the warrant requirement, an officer's authority to conduct a search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Chimel*, 395 U.S. at 762, quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *Belton*, 453 U.S. at 457, quoting *Terry*. *Chimel* ruled that search incident to arrest permits a search of the arrestee's person for weapons or evidence, as well as "the area 'within his immediate control.'" *Chimel*, 395 U.S. at 763. In *Belton*, noting that it was simply applying *Chimel*'s principles in the "particular and problematic" context of arresting a car occupant, this Court held that a valid arrest of an automobile occupant permits a contemporaneous search of the passenger compartment incident to the arrest. *Belton*, 453 U.S. at 460,

n.3 and accompany text.

Interpreting *Belton*, the Florida Supreme Court ruled that *Belton*'s bright-line rule is limited to cases where an officer "initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant" while the defendant is seated inside a ca circumstances not present in this case. JA 143. This brief supports the judgment below, but offers a more straightforward and easily applied standard: *Belton*'s bright-line rule should be confined to cases where a person is seized[2] or subject to seizure[3] while an occupant of a car. If police arrest a person who was not seized or subject to seizure while inside a vehicle, the scope of an officer's authority to search the "area" within the arrestee's immediate control is governed by *Chimel*, not by *Belton*'s *per se* search rule.

If *Belton* covers every "recent occupant" of a vehicle, as petitioner argues, police and judges must make

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[2] An individual is "seized" under the Fourth Amendment only if a reasonable person would have believed that he was not free to leave the scene, or would not have felt "free to decline [an officer's] requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 434, 436-37 (1991).

[3] A person is "subject to seizure" when the police have reasonable suspicion or probable cause that the person has committed a criminal offense. See *United States v. Sokolow*, 490 U.S. 1 (1989); *Illinois v. Gates*, 462 U.S. 213 (1983). Police have the authority to seize a motorist when they have reasonable suspicion or probable cause that the motorist has committed a crime or traffic offense. See *Delaware v. Prouse*, 440 U.S. 646, 653 (1979) ("stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment").

individualized assessments regarding an arrestee's temporal and spatial proximity to a vehicle. Indeed, petitioner concedes the point. Restricting *Belton* to cases where an occupant of a vehicle was subject to seizure avoids case-by-case judgments regarding an arrestee's "association" with a vehicle. Police officers and judges need only decide whether a person was seized or subject to seizure while an occupant of a car. When police seize a person inside a car and the person is subsequently arrested, *Belton*'s *per se* rule applies.

Before explaining why this *per se* rule advances Fourth Amendment principles generally and the goals of *Belton* specifically, this brief explains why the Florida Supreme Court correctly interpreted this Court's precedents. *Belton* defined what constitutes "immediate control" under *Chimel* for the frequently occurring situation where police seize and arrest automobile occupants. Rather than forcing officers to make individualized assessments of a car occupant's "grabbing distance," *Belton* established a bright-line rule to resolve the ambiguities that arose when *Chimel*'s "immediate control" test was applied to an arrestee who was seized inside a car. When police seize a person outside a car before executing an arrest, there is no ambiguity regarding the arrestee's "grabbing distance" inside the car. Thus, the need for *Belton*'s "bright-line" rule is absent.

The ruling below properly refused to extend *Belton* to all cases involving a "recent occupant" of an automobile. Justice Stewart's opinion in *Belton* confirms that the Court's ruling only applies to arrestees who were "occupants" of an automobile when seized by the police. Extending *Belton* to cover all "recent occupants" who have exited their vehicles prior to being seized by the police generates greater uncertainty and necessitates case-by-case decisions regarding an arrestee's temporal and spatial proximity to a vehicle for search incident to arrest purposes. Petitioner also asserts that

"close association" or recent occupancy is the "only condition required" to searching an arrestee's vehicle. Pet Br. 11 & 13. Petitioner's argument is a radical departure from the search incident to arrest rules announced in *Chimel* and *Belton*, and has never been approved by this Court.

ARGUMENT

I. *BELTON*'S BRIGHT-LINE RULE WAS NOT A SHIFT OR EXPANSION OF *CHIMEL*'S SEARCH INCIDENT TO ARREST TEST; RATHER, *BELTON*'S HOLDING WAS COMPELLED BY THE NEED FOR A *PER SE* RULE FOR THE FREQUENTLY OCCURRING SITUATION WHERE POLICE SEIZE AND ARREST CAR OCCUPANTS

In *Chimel v. California*, *supra*, this Court sought to clarify the authority of the police to search incident to arrest.[4]

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[4] In resolving Fourth Amendment questions, this Court often considers common law rules to evaluate the reasonableness of a challenged police intrusion. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). Generally speaking, the common law permitted searches incident to arrest. However, the legality of a search incident to arrest "has historically been formulated into two distinct propositions." *United States v. Robinson*, 414 U.S. 218, 224 (1973). The common law recognized an officer's power to seize weapons or stolen property from an arrestee's *person*. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich.L.Rev. 547, 627 (1999). Searching the *area* within the control of the arrestee, "while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched." *Robinson*, 414 U.S. at 224. To the extent that the common law "yields [an] answer," *Houghton*, 526 U.S. at 299, on the scope of an officer's authority to search the "area"

For half a century prior to *Chimel*, the scope of an officer's authority to search incident to arrest was "subject to shifting constitutional standards" and inconsistent statements from the Court. *Id.* at 770 (White, J., dissenting). In fashioning a rule for this area of the law, *Chimel* explained that although search incident to arrest power was not controlled by the requirements of the Fourth Amendment's Warrant Clause, an officer's authority in this context would be judged by the same constitutional norms that governed other warrantless intrusions. Thus, the scope of an officer's authority to search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'"

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within an arrestee's control, those sources do not support a broad interpretation of an officer's authority to search incident to arrest.

At the time of the framing, legal authorities did not recognize an officer's power to search an arrestee's home incident to arrest. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791, at 1183-84 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (footnote omitted) ("The legal authors of 1761-1776 agreed that houses could be broken into to consummate the arrest process, but they did not also say that houses could be searched during that process. The assumption of most legal authorities, in other words, was that arrests and arrest warrants were not excuses to conduct general searches."). Professor Telford Taylor has asserted that "[t]here is little reason to doubt that search of an arrestee's person and *premises* is as old as the institution of arrest itself," Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969) (emphasis added), but the historical support for Taylor's conclusion on the scope of an officer's power to search an arrestee's home incident to arrest is extremely weak. See Davies, *supra*, at 646, n.276. Professor Thomas Davies has noted that "[t]he reported decisions regarding the allowable scope of searches incident to arrest first became evident in court records during the late nineteenth century. *Id.* at 638, n.250. Thus, the common law, at the time of the framing, did not recognize broad powers of search incident to arrest.

Chimel, 395 U.S. at 762, quoting *Terry v. Ohio*, 392 U.S. at 19. Consistent with this fundamental norm of search and seizure doctrine,[5] *Chimel* held that search incident to arrest authority permits the police to search the arrestee's person, as well as "the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

New York v. Belton, *supra*, built directly on *Chimel*'s holding. In *Belton*, the Court addressed the following narrow issue: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*?" *Id.* at 455 (emphasis added). In answering this question, the Court reaffirmed what *Chimel* had emphasized: search incident to arrest power "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Belton*, 453 U.S. at 457, quoting *Terry v. Ohio*, 392 U.S. at 19 (internal quotation marks omitted). Indeed, *Belton* explained that its ruling "does no more than determine the meaning of *Chimel*'s principles in this particular and problematic content [sic]. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Belton*, 453 U.S. at 460, n.3. *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted).

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[5] See e.g., *Wilson v. Layne*, 526 U.S. 603, 611 (1999) ("the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion").

Belton did not represent a shift or expansion of the fundamental norm announced in *Chimel*. On the contrary, the bright line created in *Belton* defined what constitutes "immediate control" under *Chimel* for the frequently occurring situation where police seize and arrest automobile occupants. In other words, *Belton* established a straightforward and easily applied definition of *Chimel*'s "grabbing distance" principle for a person seized while an occupant of a car.

A. The Factors Compelling *Belton*'s Bright-Line Rule

When police arrest a person inside a home, *Chimel* permits a search of the arrestee's person, as well as a search of the area within the arrestee's "immediate control." *Chimel*, 395 U.S. at 763. When an arrest occurs indoors, deciding what constitutes an arrestee's "immediate control" depends on the particular facts of each case. See 3 Wayne R. LaFave, SEARCH AND SEIZURE, § 6.3 (c) at 305-12 (3d ed. 1996). In *Belton*, this Court recognized that determining the "proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupant," 453 U.S. at 459, involves a "problematic" application of *Chimel*'s "immediate control" rule. *Id.* at 460, n. 3; see also *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in judgment) (describing the issue in *Belton* as presenting a "volatile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway"). Applying *Chimel*'s "immediate control" test in this context is problematic for both practical and doctrinal reasons.

As a practical matter, an officer cannot remove a motorist from a car, effectuate an arrest, secure the arrestee, and search his "grabbing distance" in a single stroke. This dilemma is particularly vexing when a single officer encounters

a multi-occupant vehicle, as was the case in *Belton*.[6] When conducting the arrest of a motorist or passenger inside a car, an officer first secures an arrestee to protect his or her own safety. Then an officer exercises his authority to search the area within the immediate control of the arrestee. In all but the most extraordinary case, when the officer begins a search incident to arrest, the arrestee is no longer inside the vehicle, see *United States v. Karlin*, 852 F.2d 968,970-71 (7th Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989), just as a pedestrian will be secured before an officer searches a container or object within the grabbing distance of the pedestrian. See e.g., *Draper v. United States*, 358 U.S. 307, 314 (1959) (search of a "zipper bag" that arrestee was carrying was valid search incident to arrest).

As a doctrinal matter, *Chimel*'s "immediate control" test produced inconsistent results when applied on a case-by-case basis to the arrest of a car occupant. See *Belton*, 453 U.S. at 460-61. Although easily stated, the "immediate control" rule offered hazy answers for police and the judiciary when applied to a person seized inside a car. For the officer in the field, the "immediate control" test failed to provide clear answers to basic questions regarding their authority to search incident to arrest. For example, does "the area within the immediate control of the arrestee" include a container found on the backseat of a car when an officer arrests a motorist for drunk driving? Is the glove compartment part of "the area

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[6] In *Belton*, an officer stopped a vehicle that contained four occupants. After developing probable cause that contraband was in the car, the officer ordered the men out of the car and placed them under arrest. At the time, the officer had only one set of handcuffs. See Brief for Petitioner at 3 *New York v. Belton*, 453 U.S. 454 (1981) (No. 80-328)(citing Joint Appendix 55, 56). As the State later stressed in its brief, when the officer began his search, the situation was "still fluid." *Id.* at 8.

within the immediate control of the arrestee" when the arrestee is a passenger seated in the backseat of a car? The "immediate control" rule of *Chimel* did not provide police any "bright-line" answers to these basic questions.

Nor did *Chimel* provide clear solutions to judges in cases where an arrestee was seized while inside a car. Prior to *Belton*, the scope of an officer's authority to search a car incident to the arrest of a motorist remained uncertain. Lower court rulings were often inconsistent. Indeed, *Belton* acknowledged that "no straightforward rule ha[d] emerged from the litigated cases" regarding the extent of police authority to search a car incident to the arrest of an occupant. 453 U.S. at 459.

Accordingly, *Belton*'s bright-line rule was designed to make it easier for police and judges to apply *Chimel*'s "immediate control" test to a person seized while occupying a car.

> [*Belton*] adopted a factual presumption that, if the arrestee is an occupant of the vehicle, the arrestee can reach in the vehicle and get a weapon or destroy evidence. Following *Belton*, a showing of the actual fact of occupancy would automatically provide the presumed fact of access to the passenger compartment which is required by *Chimel* as a prerequisite for a warrantless search of a vehicle incident to arrest.

Glasco v. Virginia, 513 S.E.2d 137, 144 (Va. 1999)(Lacy, J., concurring).

Instead of police officers conducting individualized, on the spot assessments of an automobile occupant's "grabbing

distance," *Belton* established a bright line to resolve the ambiguities that arose when *Chimel*'s "immediate control" test was applied to an arrestee who was seized inside a vehicle: For someone seized while an occupant of a car, *Chimel*'s "immediate control" test would be triggered at the moment the police seizure occurred, and would extend to the entire passenger compartment of the vehicle.

B. The Factors That Compelled *Belton*'s Holding Are Absent When An Officer Seizes A Person Outside A Vehicle

The practical and doctrinal concerns that compelled *Belton*'s holding are absent when a suspect is seized outside a vehicle. Therefore, *Belton*'s *per se* rule is no longer necessary; instead, the scope of an officer's authority to search incident to arrest is controlled by *Chimel*.

When police arrest a pedestrian, they are not confronted with the practical quandary an officer confronts when attempting to arrest a person seated inside a car: simultaneously removing a suspect from a vehicle, executing an arrest, and searching the "grabbing distance" of the suspect in a single stroke. Therefore, the Florida Supreme Court correctly held that *Belton*'s bright-line rule should not extend to arrests and searches that go beyond the concerns that compelled *Belton*'s specific holding.

Similarly, when police seize a person outside a vehicle before executing an arrest, the need for a bright-line rule that defines the arrestee's "immediate control" inside the vehicle is absent. "The objective and the virtue of the *Belton* decision was to obviate uncertainty in applying the *Chimel* 'lunge area' rule to automobile searches. *Belton* simplified the task of [police] and the courts by declaring that the entire passenger compartment would be deemed within the arrestee's reach,

and thus subject to search, when a vehicle occupant is arrested." *Idaho v. Foster*, 905 P.2d 1032, 1038 (Idaho Ct. App.1995). When the seizure occurs outside a car, however, the ambiguity regarding an arrestee's "grabbing distance" inside the car is missing. As the District of Columbia Circuit has recognized, "[n]o such ambiguity exists...where the police come upon the arrestees outside of an automobile. Under such circumstances, the rationale for *Belton*'s bright-line rule is absent; instead, the normal framework of *Chimel* applies." *United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir.), *cert. denied*, 493 U.S. 829 (1989).[7]

Petitioner contends that a "valid custodial arrest of a recent occupant of a motor vehicle is the only condition required to be met in order to conduct a contemporaneous search of the vehicle incident to that arrest." Pet. Br. 11. Petitioner's argument permits an automatic and suspicionless search of an arrestee's car and the private possessions therein, without the concerns that compelled *Belton*'s holding. More importantly, *Belton* is severed from its foundation in *Chimel* if it is extended to a case where police seize an individual outside of a car. As noted, both *Chimel* and *Belton* recognized that the scope of a search incident to arrest "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Chimel*, 395 U.S. at 762, quoting *Terry v. Ohio*, 392 U.S. at 19 (internal quotation marks omitted); *Belton*, 453 U.S. at 457. In practice, this

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[7] Accord, *United States v. Christian*, 187 F.3d 663, 671, n.6 (D.C. 1999) (citing *Fafowora* and explaining that *Belton* does not apply where police observed suspect standing beside an empty vehicle). Interestingly, in *Christian*, the United States, in contrast to the position of the Solicitor General here, urged a position similar to that adopted by the Florida Supreme Court *sub judice*. See *id.* ("In the instant case, the government does not urge the application of *Belton*, but rests instead on the normal framework of *Chimel*.").

means that searches incident to arrest must be confined to "the arrestee's person and the area 'within his immediate control.'" *Chimel*, 395 U.S. at 763. If police are automatically permitted to search an arrestee's car even though the vehicle is not "'within his immediate control,'" they are not obeying the rule announced in *Chimel*. *Id.* Put simply, "[i]f there is no connection shown between a person's occupancy of a vehicle and his arrest, then extending the scope of the search incident to arrest to the vehicle is neither 'tied to' nor 'justified by' circumstances of the arrest." *Glasco v. Virginia*, 513 S.E.2d at 144 (Lacy, J., concurring), quoting *Belton*, 453 U.S. at 457.

The analysis of the Florida Supreme Court is compelled by *Chimel*'s holding. Indeed, *Chimel* warned that a search incident to arrest provides no justification "for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. Similarly, there is no comparable justification for searching an arrestee's vehicle unless it is "'within his immediate control." *Chimel*, 395 U.S. at 763. As the Minnesota Supreme Court aptly put it, "*Belton* does not permit searches of arrestees' vehicles; it permits searches of occupants' vehicles incident to lawful arrest." *Minnesota v. Robb*, 605 N.W. 2d 96, 101 (Minn. 2000).

II. THE RULING BELOW CORRECTLY REFUSED TO EXTEND *BELTON* TO ALL CASES INVOLVING A "RECENT OCCUPANT" OF AN AUTOMOBILE

According to petitioner, *Belton* makes no distinction between the arrest of an occupant and a recent occupant of an automobile. Petitioner also contends that the ruling below – which distinguished between a person who is ordered out of his vehicle and someone who exits his vehicle without police

contact – "serves only to blur, if not totally erode, the *Belton* principle." Pet. Br. 5. Petitioner's analysis, however, is inherently confusing. At times, petitioner suggests that *Belton* applies any time someone associated with an automobile is arrested. *Id.* at 13-14 ("If close association with the car is demonstrated at the moment of arrest, the arrestee is considered a 'recent occupant.'") Thus, petitioner asserts a search of an arrestee's vehicle is always permissible because "the arrest itself provides the justification for a search." *Id.* at 4. Cf. U.S. Br. 17 ("[R]egardless of why an individual gets out of his car, 'the bright-line that [this Court] drew in *Belton* clearly authorizes [a search of the car] whenever officers effect a custodial arrest.'") (internal quotations marks omitted).

In other places, petitioner suggests that *Belton*'s *per se* rule is limited to "recent occupants" of automobiles. Pet. Br. 7 ("If a valid custodial arrest of a recent occupant of a motor vehicle has been effected, a search of that vehicle incident to that arrest may be undertaken."). On the next page, however, petitioner concedes that restricting *Belton* to "recent occupants" does not create a bright-line rule for police or judges. See Pet. Br. 8 ("*Belton*'s bright-line rule is not without limits. Indeed, certain factual situations will present temporal and spatial expansion that will render a search unreasonable."). Petitioner's analysis is contradictory, and petitioner's proposal to extend *Belton* to "recent occupants" will create greater uncertainty regarding an officer's authority to search incident to arrest.

A. *Belton*'s *Per Se* Rule Applies Only When Police Seize A Person In A Car And The Person Is Subsequently Arrested

Petitioner's argument that *Belton*'s holding controls both "occupants" and "recent occupants" of a car misreads *Belton*. As the nation's most prominent Fourth Amendment

scholar has explained, "*Belton* applies only in the case of 'a lawful custodial arrest of the occupant' of the vehicle." LaFave, supra § 7.1(a) at 436 (footnotes omitted).

Justice Stewart's opinion in *Belton* confirms that the Court's ruling only applies to an arrestee who was seized while an occupant of a car. First, the facts show that Roger Belton and three others were occupants of a car when their vehicle was seized for speeding. Although Belton had exited the vehicle before being placed under arrest, thus making him a "recent occupant," his status as a "recent occupant" was the direct result of the officer's authority to seize Belton while he was inside the car and to arrest him after detecting evidence of contraband within the car.

Next, when describing the precise issue before it, *Belton* indicates that the Court was focusing on arrestees who were occupants of automobiles. In the opening sentences of his opinion, Justice Stewart wrote: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*? That is the question at issue in the present case." 453 U.S. at 455 (emphasis added).

Significantly, *Belton*'s holding is limited to situations where an arrestee was an "occupant" of a vehicle. Thus, the Court stated: "[W]e hold that when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted) (emphasis added). Finally, when applying this holding to the facts, Justice Stewart explained that the defendant's "jacket was located inside the passenger compartment of the car in which [Belton] had been a passenger just before he was arrested," thus making the jacket

"'within the arrestee's immediate control'" for purposes of *Chimel*. *Id.* at 462 (footnote omitted).

In sum, although it is true that "an individual need not be inside the vehicle at the time of the arrest for *Belton* to authorize a search of the car incident to the arrest," U.S. Br. 12, and that *Belton* itself used both the terms "occupant" and "recent occupant," see 453 U.S. at 460, *Belton*'s analytical focus was directed toward an arrestee who was an occupant of a car when seized by the police. The lone use of the term "recent occupant" in *Belton* was an obvious reference to an arrestee who had been seized by the police while he or she was an occupant of an automobile. See also, *Glasco v. Virginia*, 513 S.E.2d at 144 (Lacy, J., concurring).

B. The Term "Recent Occupant" Is Inherently Ambiguous

Petitioner and the United States argue that the ruling below blurs the bright-line rule established in *Belton*. Extending *Belton*, however, to cover motorists who have exited their vehicles prior to being seized by the police will generate greater uncertainty and ambiguity regarding an officer's authority to search incident to arrest. If *Belton* is read to cover all "recent occupants," police officers and the judiciary will confront new and additional line-drawing problems regarding search incident to arrest authority.

Several lower courts have noted that if *Belton* is extended to permit a search whenever police arrest a "recent occupant" who was not subject to seizure while inside a car, the clarity of *Belton* will be diminished. As one court explained, if *Belton* "is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the 'bright-line' rule becomes hazy and uncertain. [Police] would be left to wonder

what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant." *Michigan v. Fernengel*, 549 N.W.2d 361, 363 (Mich. App. 1996). If *Belton* is applied to every "recent occupant," police will have to make case-by-case determinations regarding whether an arrestee was a "recent" occupant of a vehicle and the arrestee's proximity to the vehicle at the time of arrest. See, *Texas v. Kelly*, 963 S.W.2d 866, 869 (Tex. App. – San Antonio 1998); *Gauldin v. Texas*, 683 S.W.2d 411, 414 (Tex. Cr.App. 1984). When applied to a motorist who was not subject to seizure while inside a vehicle, the term "recent occupant" has various connotations, and invites subjective judgments regarding a person's connection to a vehicle.

Even courts that adopt petitioner's position and extend *Belton* to a "recent occupant" who was not seized inside a car recognize that individualized decisions regarding the scope of an officer's authority to search incident to arrest are still necessary. For example, the Colorado Supreme Court extended *Belton* to cover a situation "where the occupant of a vehicle anticipates police contact and exits the vehicle immediately before that contact occurs." *Colorado v. Savedra*, 907 P.2d 596, 599 (1995) (en banc). By extending *Belton* in this context, the court acknowledged that the "issue of temporal proximity between the police encounter and the defendant's presence in the vehicle is the main factor courts consider in determining whether a person is a recent occupant of a vehicle for purposes of *Belton*." *Id.* In practice, this means that the officer in the field will first have to decide whether the arrestee has been outside of a car for a significant period of time, subject to the second-guessing of judges.[8]

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[8] *Id.* (noting that some courts have ruled *Belton* inapplicable where "the defendant has been outside of the car for a substantial

Other line-drawing problems have arisen when lower courts extend *Belton* to an arrestee who was not physically occupying a car when seized by the police. In *United States v. Sholola*, 124 F.3d 803 (7th Cir. 1997), the Seventh Circuit concluded that the defendant was "'positively linked'" to a vehicle when, during a conversation with an officer he had "pointed to the vehicle, opened the front driver's side door with a set of car keys in his hand, and stated, 'See, it's my car.'" *Id.* at 817. Because the defendant was "positively linked" with an automobile, the Seventh Circuit ruled that *Belton* permitted a search of the car incident to the arrest. Judge Wood concurred in the judgment in *Sholola*, but warned that judges should be mindful "not to extend [*Belton*] too far beyond its facts." *Id.* at 823. Judge Wood was concerned that the majority's use of the phrase "positively linked" might "be misunderstood in a future case." *Id.*

Sholola's extension of *Belton* illustrates the dangers of the approach advocated by petitioner. A "recent occupant" rule requires the type of case-by-case analysis and subjective judgments that petitioner and its *amicus* criticize. Just as deciding whether a person is "positively linked" to a car when he or she is seized outside the car requires considering the particular facts of each case, a decision on whether a person is a "recent occupant" also requires a particularized assessment of the facts of each case. Moreover, extending *Belton* to cover all "recent occupants" eviscerates *Chimel*. Judge Wood's criticisms of the "positively linked" test are equally pertinent to a "recent occupant" standard:

> [Some] "[recent occupants]" would plainly fall

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period of time," while other courts have found "a person to be a recent occupant where police come upon the scene immediately after the suspect has left the car.") (citations omitted).

> outside the scope of *Belton*. For example, the police could observe a suspect parking a car in an off-street legal parking lot, and then walking two blocks away from it, keeping both vehicle and suspect under constant surveillance. If they then arrested the suspect, in my view they would need something other than *Belton* to justify a search of the car, even though [the defendant] might be said to [be a "recent occupant" of the car].

Id. at 823.

Neither petitioner nor its *amicus* propose a definition of "recent occupant" that solves the line-drawing problems that arise when *Belton*'s *per se* rule is extended to any recent occupant of an automobile. Indeed, petitioner recognizes this problem, but offers no solutions. See Pet. Br. 8 ("*Belton*'s bright-line rule is not without limits. Indeed, certain factual situations will present temporal and spatial expansion that will render a search unreasonable, but whether the police officer initiated contact is not one of the factors to consider in the reasonableness calculus."). Rather than proposing a solution, the United States urges this Court to ignore the ambiguity associated with the term "recent occupant." Without attempting to define the term "recent occupant," the Solicitor General simply asserts that "[t]here is no doubt" that respondent was a "recent occupant" however that term may be defined. U.S. Br. 21.

The Solicitor General ducks the hard question of defining under what circumstances an arrestee qualifies as a "recent occupant" by suggesting that *Belton*'s applicability to "outlying cases" need not be decided now. *Id.* at 21, n.7. What the Solicitor General calls "outlying cases," however, have actually generated a substantial amount of litigation in

the lower courts regarding the proper scope of *Belton*'s automatic search rule. See LaFave, *supra*, § 7.1(a) at 436-37, n. 25 & 26 (3d ed. 1996 & Supp. 2001) (citing cases illustrating split among lower courts on *Belton*'s applicability to arrestees who were recent occupants of vehicles). If bright lines are essential to guide officers and judges, then *Belton*'s holding should be left undisturbed and this Court should reject petitioner's proposal to extend *Belton* to any "recent occupant of a motor vehicle." Pet. Br. 7.

C. The Court's Precedents Do Not Support Petitioner's Argument That Arresting A "Recent Occupant" Of A Vehicle Automatically Triggers A Search Of A Car Incident To Arrest

Although petitioner and its *amicus* focus their attack on the Florida Supreme Court's application of *Belton*'s *per se* rule, petitioner's proposal would do more than simply eliminate the distinction created by the Florida Supreme Court. Under petitioner's approach, whenever someone associated with a vehicle is arrested, police may automatically conduct a contemporaneous search of that vehicle. The rule urged by petitioner is a radical departure from the search incident to arrest rules announced in *Chimel* and *Belton*.

Recognizing that a "recent occupant" test is not a bright-line rule, petitioner asserts that "close association" with a car is sufficient to trigger *Belton*'s *per se* search rule. Petitioner states that "[i]f close association with the car is demonstrated at the moment of arrest, the arrestee is considered a 'recent occupant.' This can be shown where the arrestee has acknowledged he owns the car, where the arrestee has recently been physically in the car, or where the arrestee is close enough to the car to continue to have access to it." Pet. Br. 14 (footnote omitted). Later, petitioner unequivocally asserts: "A valid arrest of a recent occupant of

a motor vehicle, without more, justifies a search incident to arrest under *Belton*." *Id.* at 18 (emphasis added). Petitioner is unable to cite any precedent from this Court for its position because none exists.

Petitioner interprets *Chimel*'s "immediate control" rule as if it were identical to a test of possession. The logic supporting petitioner's argument recalls an era of this Court's search incident to arrest jurisprudence that permitted police to search the area considered to be in the "possession" or under the "control" of the arrestee. For example, in *Harris v. United States*, 331 U.S. 145 (1947), a five-hour search of a four-room apartment was upheld as a valid search incident to arrest because the arrestee "was in exclusive possession" of the premises. *Id.* at 152. See also *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950) (relying on *Harris* to uphold an hour and a half search of defendant's office as a valid search incident to arrest). The logic that supported the results in *Harris* and *Rabinowitz* was firmly rejected in *Chimel*. See *Chimel*, 395 U.S. at 760. Despite that clear rejection, petitioner proposes that suspicionless car searches are *per se* reasonable conditioned only upon the arrest of a recent occupant. If Fourth Amendment principles "preclude[] indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest," *Harris*, 331 U.S. at 164 (Frankfurther, J., dissenting), then those same principles preclude treating a man's vehicle as the equivalent of a shopping cart pushed by the arrestee at the time of his arrest.

Petitioner and its *amicus* also contend that in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court already decided the issue preserved in this case. According to petitioner, *Long* "noted that an arrest itself is a significant event which, in and of itself, justifies an 'automatic' search incident to that arrest." Pet. Br. 6; *see also* U.S. Br. 14 (*Long* "confirms that *Belton*

is not limited to instances in which the arrestee is ordered out of the car by police."). The dicta from *Long* provides no basis for reversing the ruling below.

In *Long*, police observed Long's car traveling erratically and speeding. After watching the car swerve into a ditch, the police stopped to investigate. Long met the officers at the rear of the car. Suspecting that Long was intoxicated, the officers asked to see his license. As Long walked toward the open door of his car, the officers observed a large hunting knife on the floor. After frisking Long, the police conducted a search of the passenger compartment for other weapons. Inside the car they found marihuana. *Long* held that a protective search of a passenger compartment is valid when reasonable suspicion exists that a car contains weapons potentially dangerous to police.

In dicta, *Long* stated "if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York v. Belton*." *Id.* at 1035, n.1; see also *id.* at 1049, n.14 ("[T]he 'bright line' that we drew in *Belton* clearly authorizes... a search whenever officers effect a custodial arrest."). *Long's* dicta is consistent with the interpretation of *Belton*'s *per se* rule as limited to cases where police seize or have the authority to seize a person while he or she is an occupant of a car. Police had the authority to stop Long as soon as they observed his vehicle traveling erratically and speeding. Because Long was subject to seizure while an occupant of a car, his ability to exit his vehicle before being ordered to do so by the police does not negate the applicability of *Belton*'s *per se* rule. See *infra* Part III.

Indeed, it is clear that this Court has never gone so far as to hold that arresting a recent occupant of a car is the "only condition required" to searching an arrestee's vehicle, as

implied in *Long's* dicta and as asserted by petitioner. *See* Pet. Br. 11. Such a holding would constitute a radical departure from the standards announced in *Chimel* and *Belton*. Although in recent years this Court has greatly enlarged the automobile exception, searches under that doctrine are never "automatic." Such searches always require probable cause that contraband is inside a car. *See Houghton, supra.* Similarly, searches under *Long* require reasonable suspicion that a car's passenger compartment poses a threat to an officer's safety; *Long* does not authorize an "automatic" search. *See Long*, 463 U.S. at 1049, n.14 ("We stress that our decision does not mean that the police may conduct automobile searches whenever they conduct an investigative stop."). The rule urged by petitioner, however, allows an automatic and suspicionless search of an automobile whenever police arrest a "recent occupant" of an automobile. This Court has never announced such a holding. Since *Chimel*, this Court's search incident to arrest precedents have embraced Justice Frankfurter's view that "[a]uthority to arrest does not dispense with the requirement of authority to search." *Harris*, 331 U.S. at 165 (Frankfurther, J., dissenting).[9]

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[9] Petitioner's reliance on *Maryland v. Buie*, 494 U.S. 325 (1990), is similarly misplaced. Pet. Br. 8 ("If it is reasonable for the police to be to protect themselves in homes, it is certainly reasonable for the police to be able to protect themselves on the street when they place an individual under arrest.") Unlike the *per se* search rule urged by petitioner, the protective sweep *Buie* authorized "is decidedly not 'automati[c],' but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene." 494 U.S. at 336.

III. *BELTON*'S *PER SE* RULE SHOULD BE RESTRICTED TO CASES WHERE A PERSON WAS SEIZED OR SUBJECT TO SEIZURE WHILE AN OCCUPANT OF A CAR

The Florida Supreme Court correctly held that *Belton*'s *per se* search rule was inapplicable to the facts of this case. The ruling below confines *Belton*'s bright-line rule to cases where an officer "initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant" while the defendant is seated inside a car. JA 143. Although the ruling below properly applies this Court's precedents, a more workable and efficient rule is available to resolve the line-drawing problems surrounding the application of *Belton* to a "recent occupant" of a vehicle. A better standard limits *Belton*'s *per se* rule to cases where a person is seized or subject to seizure while inside a car. If police arrest an occupant or recent occupant of a vehicle who was not seized or subject to seizure while inside a vehicle, the scope of an officer's authority to search incident to arrest is governed by *Chimel*, not by *Belton*'s automatic search rule.

This reading of *Belton* advances Fourth Amendment principles generally and the goals of *Belton* specifically. First, the facts and holding of *Belton* itself establish a *per se* rule when a person is seized while an occupant of a car. As noted, Roger Belton and three others were occupants of a car when their vehicle was stopped for speeding. Although Belton was ordered out of the car, thus making him a "recent occupant" of the vehicle, his status as a recent occupant was the direct consequence of the officer's authority to seize Belton while he was an occupant of a vehicle. Under these circumstances, *Belton* held that "when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the

passenger compartment of that automobile." 453 U.S. at 460 (footnotes omitted) (emphasis added).

Second, confining *Belton* to cases where a person was seized or subject to seizure while inside a car produces a rule that is easily understood and may be routinely followed by police officers. Well-trained officers know when they effect a seizure of a person,[10] and when they have the authority to seize an occupant of a vehicle. *See Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops are unconstitutional; police may seize a vehicle where probable cause or reasonable suspicion exists that a motorist has committed a traffic violation or other crime). Thus, whenever police observe a vehicle commit a traffic violation, as in *Belton* or *Long*, they have the authority to seize the vehicle and its occupants. If during the course of that seizure, probable cause to conduct an arrest develops, *Belton*'s *per se* rule applies regardless of whether the occupants of the vehicle remain seated in the car, have been removed from the car, or have exited the vehicle voluntarily.

A few lower courts have applied *Belton* in cases involving so-called "recent occupants" to remove the concern that officers might have to "race" to a suspect's vehicle to prevent the suspect from exiting from his or her car. *See e.g., Nebraska v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App. 1992) ("In order to conduct a valid search, police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of his or her

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[10] Under this Court's precedents, a person is "seized" under the Fourth Amendment only if a reasonable person would have believed that he was not free to leave the scene, or would not have felt free to decline an officer's requests or otherwise terminate the encounter. *See Florida v. Bostick*, 501 U.S. 429, 434, 436-37 (1991).

vehicle."); cf. *Colorado v. Savedra*, 907 P.2d at 600 ("If *Belton* were read to preclude a search...where police contact occurred just after the suspect exited his vehicle, then knowledgeable suspects could effectively conceal evidence by stepping outside of their vehicle whenever they saw a police officer approaching."). A better and more efficient rule would minimize the factors police must consider when determining the applicability of *Belton*. "When," "where," or "how" an officer initiates contact with an automobile occupant, the degree of police contact, or whether the occupant has "anticipated" possible imminent police contact,[11] should be immaterial in determining *Belton*'s applicability.

Confining *Belton* to cases where police have the authority to seize a car occupant eliminates the worry that officers will have to "race" from their patrol cruisers to a seized vehicle to prevent an occupant from exiting his car. If police have the authority to stop a vehicle while the suspect is inside, as they did in *Gonzalez*, 487 N.W.2d at 568, a suspect cannot make the car "*Belton*-proof" by exiting the vehicle before the officer can vacate his cruiser. Even a suspect who

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[11] *See Savedra*, 907 P.2d at 601 (applying *Belton* because "[t]he indirect contact between [defendant] and the police officer occurred when the officer entered the parking lot. That is the point at which [defendant] left his vehicle, and it is reasonable to conclude that he did so either to avoid police contact or to divert the location of the contact away from the truck."); cf. *United States v. Mans*, 999 F.2d 966, 968-69 (6th Cir. 1993), *cert. denied*, 510 U.S. 999 (1993) (applying *Belton* even though defendant had exited his vehicle prior to when officer initiated verbal contact; officer had initiated contact with defendant sometime earlier when defendant knew officer was following him). Unlike the term "seizure," which has a definitive legal meaning and is understood by police officers and judges, the term "initiates contact" has no content or legal significance under the Fourth Amendment.

voluntarily exits his vehicle during a traffic stop is still considered "seized" for Fourth Amendment purposes until the traffic stop is completed. Cf. *Long*, 463 U.S. at 1051 (noting that during any investigative stop, police may detain person against his will). Further, an officer will not have to make "an individualized determination as to the reason that the arrestee got out of his car." U.S. Br. 19. Where a vehicle is lawfully seized or subject to seizure, and the occupant is later arrested, *Belton* applies regardless of why an arrestee exits his or her car.

Third, limiting *Belton* to cases where a person was seized while an occupant of a car produces a rule that is consistent with analogous Fourth Amendment rules governing an officer's power to investigate and detain occupants of automobiles. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (*per curiam*), held that during a traffic stop police may routinely order a driver out of his vehicle. See also *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (extending rule of *Mimms* and holding "that an officer making a traffic stop may order passengers...out of the car pending completion of the stop")(footnote omitted). In reaching this conclusion, however, *Mimms* emphasized that it was not holding "that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." *Mimms*, 434 U.S. at 111, n.6 (internal quotation marks omitted).

Mimms and *Wilson* restrict forcible exit orders of car occupants to lawful seizures. A contrary rule would subject anyone in a car to an arbitrary intrusion. Likewise, if police have no basis for seizing an automobile occupant, that person's decision to exit his vehicle should not occasion an automatic search of his vehicle merely because the person is later arrested outside the vehicle. A few lower courts, however, have applied *Belton* to cases where police arrest

"recent occupants" of vehicles who were not subject to seizure while inside their vehicles. *See Glasco v. Virginia, supra; Colorado v. Savedra, supra*. These courts reasoned that a *per se* search is valid because "a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact." *Glasco*, 513 S.E.2d at 142. This reasoning, however, proves too much.

By analogous reasoning, the police could search a basement or kitchen that an arrestee has just exited prior to his arrest in the living room because the arrestee had the "same motive and opportunity to destroy evidence or obtain a weapon" as a person who was initially seized by the police in while the basement or kitchen. This type of sloppy logic was rejected in *Chimel*: "There is no comparable justification...for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Chimel*, 395 U.S. at 763. In sum, if police do not have the authority to seize a person sitting in a car, then that person's decision to exit his vehicle cannot justify an automatic search of the vehicle if the person is subsequently arrested outside the car.

Finally, this superior Fourth Amendment standard avoids line-drawing problems. *See Belton*, 453 U.S. at 458; *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). Restricting *Belton* to cases where police have the authority to seize an automobile occupant before an arrest avoids the case-by-case decisions that are necessary to decide whether an arrestee was a "recent occupant" of a vehicle for search incident to arrest purposes. As noted above, many lower courts have recognized that if *Belton* is applied to every case involving a "recent occupant" of a vehicle, police officers and judges must make individualized determinations regarding an

arrestee's temporal and spatial proximity to a vehicle. A more efficient and responsive rule is available: police officers and judges should only decide whether a person was seized or subject to seizure while an occupant of a car. When police seize a person in a car, and the person is subsequently arrested, *Belton*'s *per se* search rule applies.

CONCLUSION

For the reasons stated above, the judgment of the Florida Supreme Court should be affirmed.

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